UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
31st meeting
held on
Tuesday, 6 November 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 31st MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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LETTER FROM THE PRESIDENT OF THE GENERAL ASSEMBLY TO THE CHAIRMAN OF THE SIXTH COMMITTEE DATED 16 OCTOBER 1990 (continued)

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Distr. GENERAL
A/C.6/45/SR.31
12 November 1990

ORIGINAL: ENGLISH

90-56901 2986S (E)

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The meeting was called to order at 10.15 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. The CHAIRMAN, speaking on behalf of the Committee, welcomed Mr. Doudou Thiam of Senegal, the Special Rapporteur on the draft Code on Crimes against the Peace and Security of Mankind.

2. Mr. AL-BAHARNA (Bahrain) said that his delegation was gratified by the progress made by the Commission at its forty-second session on the question of State responsibility. The issue was complex and important, and he urged the Committee to be more patient with regard to the pace of the Commission's work in that area.

3. The Special Rapporteur for the topic had generally approached remedies from the point of view of injuries to aliens in cases of torts. The judicial and arbitral decisions invoked in that connection dealt with damage to property, bodily harm or loss of life affecting aliens. That approach had adversely affected the text proposed by the Special Rapporteur. Furthermore, in his eagerness to develop the law, the Special Rapporteur had drawn too fine a distinction between various remedies. The Commission should be less academic and more practical in its approach to remedies.

4. Draft articles 8, 9 and 10 as proposed by the Special Rapporteur were reproduced in chapter V of the Commission's report (A/45/10). The main purpose of draft article 8 was to provide full reparation in the form of pecuniary compensation. In codifying the rules of international law on compensation, the Commission should, given the current stage of international law, not go beyond the dictum of the Chorzów Factory case, to the effect that the result of reparation should be to wipe out all legal and material consequences of the unlawful act in such a manner as to establish the situation that would exist if the wrongful act had not been committed. It would be unwise to develop international rules regarding remedies on the analogy of current principles of tort law, which was for the most part a Western contribution. To do so might even run counter to the interests of developing countries.

5. His delegation also believed that the expression "economically assessable damage" in draft article 8, paragraph 2, was open to objection on grounds of both language and substance. The expression was too subjective and controversial, and the Commission should replace it with a more objective criterion. His delegation was also sceptical about including "moral damage" in the same paragraph, because there was no uniformity in compensation in such situations.

(Mr. Al-Baharna, Bahrain)

6. The formulation by the Special Rapporteur on lost profits in draft article 8, paragraph 3, appeared to go beyond current international law. His delegation agreed with those members of the Commission who had considered the reference to "any profits" in that paragraph to be too broad, encompassing all profits without any qualification. The Commission should modify the paragraph to make it clear that only such profits as were normal and foreseeable, and reasonable and equitable in the circumstances were covered by the expression "lost profits".

7. With regard to draft article 8, paragraph 4, which sought to establish the importance of a causal link to an internationally wrongful act, he said that while the principle was acceptable to his delegation, the concept of "uninterrupted causal link" should be replaced by "proxima causa", for the reasons outlined in paragraph 372 of the Commission's report.

8. His delegation could agree to delete draft article 9 on interest, and to include the general obligation to pay interest in draft article 8. It was unwise to regulate in detail the rate of interest or the nature of interest, as different groups of States would have different interpretations.

9. The remedy of satisfaction and guarantees of non-repetition dealt with in draft article 10 were two distinct remedies, the former dealing with past conduct and the latter with future behaviour. They should be dealt with under two separate headings and articles. His delegation also had reservations about including "punitive damages" under the remedy of satisfaction, since it viewed them as inconsistent with the principle of the sovereign equality of States. His delegation also agreed that paragraph 4 should be deleted, for it, too, was inconsistent with the principle of sovereign equality.

10. With respect to the impact of fault on pecuniary compensation and satisfaction, while in principle his delegation agreed with the Special Rapporteur that fault might be a factor in the determination of the forms of remedy, the question of attribution of fault to a State was too complex and required deeper analysis. The Commission should study further the impact of fault on State responsibility in general, and on remedies in particular.

11. Ms. SKINNER (Ireland) said that her delegation continued to attach considerable importance to the question of international liability for injurious consequences arising out of acts not prohibited by international law. Only by proceeding step by step in a logical manner would progress be made on that difficult topic. The objective must be to elaborate a framework, a set of general principles to guide States in their relations with neighbours when activities involving risk were undertaken, and the overall aim should be initially to protect and alternatively to compensate innocent victims.

12. After reviewing the original parameters of the debate, she said that her delegation believed that diminishing attention was being paid to the relatively simple scenario of a State undertaking an act or activities which created a risk of causing transboundary harm. However, that should be the most important stage in

(Ms. Skinner, Ireland)

the process, for prevention was the best option. Preventive measures were defined in article 2 and dealt with substantively in chapter III of the outline proposed by the Special Rapporteur (A/45/10, chap. VII, sect. B.2). However, the concept of prevention should be given greater prominence both in its placement in the text and in its substance.

13. "Prevention" was associated elsewhere in the draft articles with the related but not indistinguishable concepts of "containment" and "minimization" of transboundary harm. Her delegation felt that "prevention" should have a separate existence. It should be emphasized that the primary duty under the proposed instrument lay with the State of origin. Although potentially affected States obviously could not have a veto over activities in the State of origin, the latter should not enjoy carte blanche to conduct any act or activities it chose, regardless of possible transboundary harm, through which it might damage another State. The Commission should have a mandate to establish parameters within which the State of origin should strive to operate. Her delegation therefore supported the provisions of draft article 14, which envisaged the possibility of consultations "in an attempt to establish a régime for the activity in question that [took] into account the interests of all parties".

14. The obligations of assessment, notification and information imposed on the State of origin in draft article 11 must be applied at an early stage, as was correctly reflected in that article. The same was true of the provisions in draft article 12 regarding participation by international organizations. With regard to draft article 13, the requirement that a State should have "serious reason to believe" was excessive and unhelpful in the contexts of both prevention and reparation of harm. The provision for consultations in draft article 14 reflected the correct approach. The text should set out the standards and duties expected of a State of origin. Accordingly, the Commission should give more thorough consideration to the role and concept of "prevention".

15. In the event of transboundary harm, there should be compulsory consultations emphasizing containment, minimization and eventually reparation. The question of whether the State of origin could engage in an activity irrespective of the views of potentially affected States must be tackled. Her delegation favoured a provision limiting the freedom of the state of origin in such circumstances.

16. The fact that agreement had not yet been reached on the use or meaning of several possibly vital words or concepts underlined the difficulties in tackling the topic. It was understandable that the Commission wished to make progress on the draft as a whole and avoid getting bogged down at an early stage. However, by postponing decisions on such important concepts as "acts", "activities", "risk", "harm", "appreciable risk", "significant risk" and "transboundary harm", the Commission ran the risk of erecting an edifice built on sand.

17. Liability based on fault was not suitable in a context where the emphasis was placed on the lawfulness of the activities under consideration. A more potent objection was that a system of liability based on fault was adversarial and

(Ms. Skinner, Ireland)

litigious by nature, and tended to undermine the possibility of progress by negotiation. Absolute liability, on the other hand, was undesirable because it was too blunt an instrument, and diminished any sense of a duty of care which the State of origin might owe the affected State. It would be best to adopt a system of strict liability. The occurrence of transboundary harm - rather than the occurrence of fault - should set in motion the provisions of the future instrument. It was to be hoped, however, that problems would be resolved through bilateral and multilateral régimes negotiated by the parties before any harm occurred. Even if negotiations on prevention had not taken place or had not been concluded before the damage occurred, negotiations should take place between the parties after the damage had occurred on the basis of the criteria of strict liability. The instrument should also provide for a procedure to deal with unnecessary or tactical delaying at that stage of the proceedings.

18. Her delegation could not accept the view of the Special Rapporteur that "if the obligations of prevention were to be more stringent, i.e., if their breach would lead to State responsibility, then the topic would be dealing with wrongful acts, not with acts not prohibited by international law" (A/45/10, para. 504). Lists of activities involving risk, particularly those that were scientific in nature, were out of date before the ink was dry and, even if not exhaustive, inevitably were limitative in effect. Accordingly, the definition of "activities involving risk" should not include a reference to any list.

19. The further development of the theme of the global commons should be considered at another time. The topic of international liability for injurious consequences arising out of acts not prohibited by international law was a subject unto itself, and other important subjects which had come up for discussion in the debate should be considered separately when the Sixth Committee deemed it appropriate.

20. Turning to the question of relations between States and international organizations, she recalled the questions raised regarding the desirability of discussing the issue (A/45/10, paras. 425 and 426), and endorsed the view of the Special Rapporteur that the work of the Commission on the topic should proceed. Considerable work already had been done in pursuance of the General Assembly mandate and on the basis of an outline prepared at the Commission's thirty-ninth session. Such efforts should not be wasted by dropping or deferring a topic for which necessary time seemed to be available. The only justification for such a step would be if the work undertaken had been useless, which was not the case. It would also be useful to have a framework instrument which codified existing rules and filled lacunae. Her delegation agreed that a provision on the lines of draft article 4 concerning the relationship between the draft articles and other international agreements would be useful.

21. The Commission was at present confining the scope of its work to intergovernmental organizations of a universal character. It should indicate that relations between States and international organizations of a non-universal character should be examined at an appropriate time. To do otherwise would be short-sighted.

READEX FICHE

(Ms. Skinner, Ireland)

22. While the primary concern was with legal personality under international law, it would create problems if no account were taken of legal personality under the internal law of member States or of the host country. Her delegation therefore agreed with the suggestion that there should be separate articles on legal personality under international law and legal powers deriving therefrom (including the capacity to conclude treaties and the capacity to file an international claim) and legal personality under internal law and legal powers deriving therefrom (including the capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings) (A/45/10, para. 441). It appeared to be widely accepted that the autonomy, independence and functional effectiveness of an international organization required some degree of immunity from legal process. Her delegation agreed that absolute immunity applied to the United Nations system; however, given the rapid proliferation of international organizations for vastly different purposes, privileges and immunities should not automatically be granted to each new - or even to every existing - international organization. It agreed that the provision for waiver of immunity in draft article 7 should be explicit, and that a separate waiver of immunity should be necessary for execution.

23. Her delegation agreed with the provision of draft article 8 concerning the inviolability of the premises of international organizations. The caveat that the inviolability should apply to premises "used solely for the performance of their official functions" was a useful one. International organizations should be immune from expropriation. Any other conclusion could prove highly impractical, particularly with regard to the United Nations Headquarters building. Paragraphs 2 and 3 of draft article 8 were welcome practical provisions. Her delegation supported the provisions in draft article 9 on the non-availability of the premises of an international organization as a refuge. Lastly, it supported draft article 10 as a normal and necessary provision in such agreements.

24. Mr. SCHARIOTH (Germany) said that he would begin with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. With reference to paragraph 531 of the Commission's report (A/45/10), his delegation welcomed in principle the Special Rapporteur's proposal that the scope of the rules on State liability for transboundary harm should be more specifically described and should be linked with the concept of risk. That approach, however, should apply not only to obligations of prevention, but also to the chapters dealing with the legal consequences of damage. The duty to prevent and the duty to compensate should be covered by a single set of applicable rules.

25. His delegation favoured the preparation of a list of activities or types of activities to be covered. It doubted the practicability of relying on a list of dangerous substances. The Commission's discussions had revealed that it might not be possible to circumscribe the area of industrial activities leading to obligations of prevention and compensation by referring to certain chemical substances alone, and that other factors must be taken into account.

(Mr. Scharioth, Germany)

26. The question whether private persons or enterprises should primarily be liable for harm caused by their activities, and to what extent the State should be involved was complex and far-reaching. Recent State practice showed a certain preference for developing civil liability systems. However, the extensive treatment of civil liability in a draft on State liability might be unnecessary; it might be sufficient to introduce a rule similar to the "local remedies rule" requesting the damaged party first to exhaust other means available to it under international agreements or national legislation.

27. On the question of State responsibility, he said that the reports and drafts submitted thus far represented an impressive professional achievement reflecting the fundamental importance of the subject in terms of international law. None the less, uncertainty persisted on some basic points, for example, the scope of the distinction between international delicts and international crimes, and the question whether the individual fault of a person acting on behalf of the State played a part in establishing State responsibility. Once the Commission had finished dealing with the legal consequences of delicts and crimes, it would doubtless review part one of the draft articles, taking into account experience in recent years, including conventions and decisions.

28. His delegation endorsed the suggestion made at the preceding meeting by the representative of Denmark on behalf of the Nordic countries and the United Kingdom, to the effect that the Commission should be invited to submit to the Sixth Committee a general review of all topics pertaining to State responsibility and State liability.

29. Mr. BOUTEIKO (Ukrainian Soviet Socialist Republic), speaking on the topic of State responsibility, said that the Special Rapporteur was to be commended for his second report. The widely divergent views expressed in the Commission on the three draft articles proposed testified to the complexity of the issues involved and pointed to the need for continuing efforts to arrive at solutions acceptable from the point of view of all the major legal systems.

30. Draft articles 8, 9 and 10 (A/45/10, chap. V, sect. B.2) were concerned principally with State responsibility in the case of wrongful acts of a civil law nature; for objective reasons, little mention was made of compensation in the event of the internationally wrongful acts listed in article 19 of part one of the draft articles. In that connection, he remarked that the question of reparation for a delict had much in common with that of compensation in the case of the violation of a treaty or the commission of an international crime; it would therefore be logical, on the face of it, to suppose that the provisions of draft articles 8, 9 and 10 would to some extent be general in nature. However, the legal and material consequences of delicts and those connected with punishment for an internationally wrongful act differed in both scale and character; an objective assessment of the proposed articles could only be made in the light of corresponding provisions in respect of acts of a criminal nature, and his delegation was therefore pleased to note the indication given in paragraph 337 of the report that the Special Rapporteur was proposing to deal with those issues at a later stage. It hoped that

(Mr. Bouteiko, Ukrainian SSR)

in considering the issues involved, the Commission would not confine itself to considering existing decisions of courts or arbitration tribunals on reparation issues, but would also analyse the relevant existing bilateral and multilateral agreements. Furthermore, it would be useful if the Commission took into consideration developments relating to the implementation of paragraph 9 of Security Council resolution 674 (1990).

31. For the present, his delegation wished to make only a few preliminary comments on draft article 8. First, the title of the article did not entirely correspond to its contents and might be changed along the lines suggested by the Special Rapporteur (A/45/10, para. 346). Second, while preferring alternative (a) of paragraph 1, his delegation did not think that it went far enough in protecting the interests of the injured State. Third, the contradiction at present existing between paragraphs 2 and 4 with regard to the definition of damage would eventually have to be eliminated. Lastly, his delegation considered that the time element in the concept of an uninterrupted causal link required further careful analysis by the Commission.

32. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he referred to the comments by his delegation at the previous session of the General Assembly (A/C.6/44/SR.35), which also applied to the draft articles proposed by the Special Rapporteur at the Commission's forty-second session. An additional point he wished to make was that in cases of transboundary damage, the question of the liability of the State of origin arose only in terms of that State's failure to enact appropriate safety laws for the guidance of operators.

33. The Commission should continue its efforts to establish a realistic and clearly definable threshold beyond which strict liability was incurred. The inclusion of a list of dangerous substances or dangerous activities would resolve that problem only partially.

34. Referring to draft article 22 of the proposed outline (A/45/10, chap. VII, sect. B.2 (d)), he remarked that an international organization would be unlikely to intervene if requested to do so by only one of the affected States. Draft article 23 should be redrafted so as to ensure a better balance between the interests of the parties concerned; in particular, the square brackets in the second part of the text should be removed and some language should be added to the effect that, in determining the amount of compensation, consideration should be given to the level of co-operation between an affected State having a high scientific and technological potential and the State of origin in taking due precautionary measures. In conclusion, referring to draft article 25, he said that his delegation favoured alternative B but would prefer it to be reformulated in more flexible terms, so as not to preclude the possibility of States of origin assuming joint liability if they so wished and so agreed.

35. Mr. KNOX (United States of America), referring to chapter V of document A/45/10, said he agreed with the Commission that the Chorzów Factory case stated the fundamental principle with regard to reparation namely, that it should wipe out the legal and material consequences of the wrongful act so as to restore the injured party to the condition that would have prevailed had the act not been committed. That rule should be the Commission's point of departure in formulating articles on remedy.

36. With regard to draft article 8, paragraph 1, he had no comment for the time being on the two alternatives. The statement in paragraph 2 that pecuniary compensation should cover any economically assessable damage, including moral damage sustained by the injured State's nationals, raised the question of whether it would prove possible in practice to determine rational and readily applicable standards for determining moral damage.

37. Paragraph 3 of article 8 properly took note of the importance of compensation for lost profits. The Drafting Committee would need to consider whether it would be useful to include provisions on how lost profits were to be calculated.

38. Determination of the damage which resulted from a wrongful act necessarily depended on the standard of causation to be applied. He agreed with those members of the Commission who felt that, as currently drafted, paragraph 4 did not make clear whether or to what extent the phrase "uninterrupted causal link" would take into account the principles of foreseeability or proximate cause.

39. Paragraph 5 suggested that an injured State's contributory negligence would reduce accordingly the compensation due that State as a result of a wrongful act. While he did not dispute the general thrust of the paragraph, he shared the concern expressed by some members of the Commission at the expression "contributory negligence". The meaning of the term in common-law systems was different from its intended meaning in the paragraph, and its use might therefore be somewhat confusing.

40. Draft article 9 addressed the important issue of including interest in compensation. Interest, as rightly noted by the Special Rapporteur, was an essential element of full compensation for the consequences of an internationally wrongful act. The United States was pleased that the Commission agreed that the obligation to pay interest to ensure complete reparation should be included in the draft articles, but believed that the Commission was in danger of limiting offending States' obligation to pay interest in two ways which were not compatible with the obligation to pay full compensation.

41. First, wherever the provision on interest was eventually placed - in article 9, in paragraph 3 of article 8 or elsewhere - it should retain an explicit affirmation of the offending States' obligation to pay interest not just in cases of lost profit, but whenever necessary to ensure full compensation. Secondly, as paragraph 2 of draft article 9 currently provided, compound interest should be awarded whenever necessary to ensure full compensation. He was disappointed that

(Mr. Knox, United States)

the Commission was reluctant even to consider the possibility that compound interest could be a necessary component of full compensation. In addition, the Commission should consider whether it was appropriate to lay down a formula for the calculation of interest, rather than leaving such matters to competent judicial bodies.

42. Draft article 10 addressed the role of satisfaction and guarantees of non-repetition in the law of State responsibility. He noted that with one exception, the cases cited by the Special Rapporteur in support of the doctrine of satisfaction all pre-dated the United Nations Charter. The Commission should consider carefully whether the law of satisfaction continued to be one of general application, and in what circumstances satisfaction was not an inherent element of restitution or pecuniary compensation.

43. Lastly, with regard to punitive damages, the Commission should consider whether there were cognizable standards for the award of punitive damages for an injury not susceptible of remedy by restitution or pecuniary compensation.

44. Mr. ORDZHONIKIDZE (Union of Soviet Socialist Republics), speaking on the subject of international liability for injurious consequences arising out of acts not prohibited by international law, stressed the importance which his delegation attached to the search for a realistic and balanced solution taking into account the interests of all countries. The Special Rapporteur and the Commission as a whole were agreed that strict liability did not at present exist as a generally recognized universal principle in international law, and that work on the subject had to proceed on the basis of the progressive development of international law. Without denying the possibility, in principle, of establishing strict liability, his delegation considered that such liability should arise only in connection with the consequences of activities involving risk, and that the threshold should be raised from "appreciable damage" to "significant" or "serious" damage. The exercise of a dangerous activity, or the presence of a source of increased risk, was one of the essential elements of the strict-liability concept. His delegation could not agree to an interpretation whereby strict liability would arise from any transboundary damage irrespective of its nature.

45. The Special Rapporteur's approach to that issue blurred the distinction between strict liability incurred as a result of a lawful activity and culpable liability incurred as a result of a State's violation of its international obligations. It was the presence of risk which served as the basis for international co-operation aimed at the prevention of transboundary harm resulting from lawful activities, such as, for example, the utilization of nuclear power sources. The proposal to include a list of dangerous substances or dangerous activities in the draft was of interest in that context.

46. The draft should also be brought into line with other international documents already in force or being drafted. In that connection, he referred to work on environmental impact assessment in connection with transboundary issues being done within the framework of the Economic Commission for Europe (ECE). The senior

(Mr. Ordzhonikidze, USSR)

advisers to ECE Governments who had prepared a draft convention on that subject used the concepts of significant harmful transboundary impact and of activities capable of producing such an impact, and the list of dangerous substances in their draft was to be used in assessing the damage caused.

47. In the opinion of his delegation, the problem of the relationship between dangerous substances and various forms of activity was a scientific and technical rather than a legal one, and could be resolved only with the participation of experts in liaison with United Nations bodies and agencies. Damage should be determined on the basis of international standards applicable to particular activities.

48. Referring to specific articles of the proposed outline (A/45/10, chap. VII, sect. B.2), he said that article 4 (Relationship between the present articles and other international agreements) would have have to be brought into line with the Vienna Convention on the Law of Treaties. The provisions of article 12 (Participation by international organizations) were surely applicable only to those international organizations whose statutes permitted the activities listed in the article. Article 16 (Unilateral preventive measures) was, in his delegation's view, rather too detailed, while article 17 (Balance of interests) was acceptable on the whole. In article 20 (Prohibition of the activity), the precise nature and degree of transboundary harm which could serve as grounds for refusing authorization for the activity should be clearly specified. Article 21 (Obligation to negotiate) was, in his delegation's view, too categorical and one-sided; moreover, the commentary to the article failed to take due account of the interests of the State of origin, which, after all, was also an innocent party.

49. Article 23 (Reduction of compensation payable by the State of origin) was an important one in that it struck a balance between the interests and rights of the State of origin, on the one hand, and those of the affected State, on the other. The fact that harm might arise as a result of pioneering activities carried out in the interest of mankind at large, and that in such cases assistance had to be given to the State of origin as well as to the affected State, should also be taken into account.

50. In article 25 (Plurality of States of origin), alternative B was preferable, although joint liability could arise in special cases where two States or their legal entities were operating an installation jointly and might enter into a special agreement providing for joint liability.

51. He welcomed the reference to "the operator" in article 26 (Exceptions), as well as the whole new chapter V on civil liability. The concept of the operator or enterprise as being principally liable should be reflected more strongly in the draft as a whole; the State should not be absolutely liable for the operator's activities.

(Mr. Ordzhonikidze, USSR)

52. Lastly, he remarked that the issues raised by the concept of the "global commons" were extremely complex in both theoretical and practical terms; in his delegation's view, consideration of the concept within the framework of the current topic was premature. Whether or not it should be included in the International Law Commission's agenda as an independent topic might be considered at a later stage in connection with the future programme of work of the Commission.

53. Mr. VOICU (Romania), referring to agenda item 140, reviewed the historical background of attempts to elaborate a draft Code, and his country's contributions to those endeavours. With regard to the draft articles provisionally adopted by the Commission, as set out in paragraph 158 of document A/45/10, he said that in article 1, the bracketed words "under international law" should be included in the text, because crimes against the peace and security of mankind were in fact crimes under international law. Moreover, that interpretation was confirmed by the wording of article 2, which he supported; he disagreed with those members of the Commission who felt that the second sentence was not strictly necessary.

54. He also supported article 5, which was consistent with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, to which his country was a party. With regard to article 13, he shared the view that the threat of aggression should be treated as a separate crime. The wording, however, was too concise. The word "seriously" was questionable, as it introduced a vague condition which was open to varying interpretations. The text should be made more specific.

55. Article 14 required further examination. It was necessary to distinguish between armed subversive or terrorist activities and all other activities of that type. Furthermore, the concept of undermining the free exercise by States of their sovereign rights could not be dealt with in a simple manner. Fomenting subversive or terrorist activities by organizing, assisting or financing such activities was a very serious act in itself, and an additional characterization could weaken the content of the article. Further thought should be given to the question of retaining or deleting the word "seriously".

56. With regard to article 16 concerning international terrorism, he had taken note of the proposal to re-examine it in the light of the provisions dealing with complicity and crimes against mankind, which would be considered by the Commission at a later stage. As currently drafted, however, it appeared to be too concise, especially in comparison with article 18 concerning the recruitment, use, financing and training of mercenaries, which contained a fairly broad definition of the term "mercenary".

57. In the final version of the draft Code, there should be a better balance between articles, so as not to create the impression that the list of crimes against the peace and security of mankind had been drawn up according to varying criteria. As currently drafted, some articles contained fairly detailed definitions, while for others, definitions were given only in the commentary.

(Mr. Voicu, Romania)

58. Turning to article X, he said that the Commission had acted wisely in confining itself to illicit drug trafficking as a crime against humanity. Its task had been facilitated by the existence of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which precisely defined the term "illicit drug trafficking".

59. Concerning the question of the establishment of an international criminal court, the Commission deserved credit for going beyond the terms of reference provided by the General Assembly in its resolution 44/39 by entering into a general discussion of the advantages and disadvantages of establishing such a court as compared to the system of universal jurisdiction based on prosecution before national tribunals. Drawing attention to document A/45/437 containing replies received from Member States, he said that a number of States had expressed reservations with regard to that project; one State had argued that it was premature to extend the mandate of the Commission to the preparation of the statute of a judicial authority for the implementation of the provisions of the draft Code. Recently, however, more encouraging views had been expressed, including the position taken by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which had called for an examination of the possibility of establishing an international criminal court or a similar mechanism, and for the elaboration of provisions to ensure its effective functioning. It was to be hoped that the Commission would give due attention to that recommendation.

60. Mr. ROBINSON (Jamaica), referring to the draft Code of Crimes against the Peace and Security of Mankind, said that placement of the draft articles on complicity, conspiracy and attempt produced by the Special Rapporteur among the general principles might be useful. However, if it was intended that offences under the draft Code should be established in relation to those concepts, the articles should be placed in the section on specific offences, though that approach need not rule out their placement in the section on general principles. But in view of the definition of those terms in the section on offences, Jamaica did not think that much would be left for placement in the section on general principles.

61. It was important to complement the identification of substantive crimes against the peace and security of mankind with the attachment of international criminal responsibility to persons who participated in such crimes as accomplices or conspirators; of less importance, perhaps, was making an attempt to commit a crime an offence under the draft Code. The Code would be incomplete without those participatory and inchoate crimes; although provisions regarding such crimes were to be found in all domestic legal systems, one must guard against the temptation to transport them "lock, stock and barrel" into the régime of the Code.

62. The new version of article 15 submitted by the Special Rapporteur (A/45/10, footnote 27) was a clear improvement on the original, but the first sentence should be redrafted as follows: "Participation in the commission of a crime against the peace and security of mankind in the manner set out in subparagraphs (a), (b) and (c) constitutes the crime of complicity." The words "the following are acts of complicity" should be deleted.

(Mr. Robinson, Jamaica)

63. Jamaica did not support the view that it was necessary to define the criteria which characterized the perpetrator, before defining complicity or conspiracy. The definition of the crime was itself a definition and identification of the perpetrator.

64. Jamaica certainly supported the inclusion of acts subsequent to the commission of the crime as acts of complicity, and therefore favoured the retention of subparagraph (c). However, it would have no difficulty in agreeing to subsequent acts being dealt with as separate criminal offences. It did feel that the term "direct perpetrator" should be replaced by another term, such as "perpetrator".

65. Jamaica rejected the contention referred to in paragraphs 47 and 48 of the Commission's report. The fact that it was impracticable to prosecute a whole nation was no reason for not applying the concept of complicity to crimes against humanity; the concept could be just as effective in relation to crimes against humanity as it was in relation to war crimes committed by individuals if prosecution was confined to leaders and organizers.

66. Jamaica also rejected outright the statement in paragraph 47 that the weak point of the International Convention on the Suppression and Punishment of the Crime of Apartheid was that the application of the concept of complicity in traditional criminal law unduly widened the circle of offenders. It was a gratuitous and unwarranted criticism of the Convention, whose "weak point" stemmed from the lack of political will on the part of certain countries to engage in a meaningful struggle against apartheid.

67. It followed from the Jamaican position on the question of the relevance of complicity to all crimes under the draft Code that Jamaica would not support confining the concept of conspiracy to crimes against peace and rendering it inapplicable to crimes against humanity such as apartheid.

68. Although the new draft article 16 on conspiracy (A/45/10, footnote 29) was an improvement, it was not without fault. Conspiracy was defined twice, for example. The essence of conspiracy was the agreement between two or more persons - agreement to commit an unlawful act. The words "participation in a common plan" placed too much stress on the overt acts which were a necessary element of conspiracy. The first paragraph could in fact be omitted. The second paragraph, which Jamaica much preferred, could be reformulated so that it read: "Conspiracy means any agreement between two or more persons to commit a crime against the peace and security of mankind."

69. With regard to the point made in paragraph 60 of the Commission's report that the relevant draft article should deal with criminal intent (mens rea), Jamaica believed that consideration should be given to addressing, in the section on general principles, the question of the applicability of the concept of mens rea to all crimes under the draft Code; if that approach was not taken, then that question would have to be taken up in relation to each crime.

(Mr. Robinson, Jamaica)

70. Jamaica supported inclusion of a provision in the Code on attempts to commit crimes against the peace and security of mankind. It also welcomed draft articles X and Y as submitted by the Special Rapporteur, on illicit traffic in narcotic drugs, as well as draft article X as provisionally adopted by the Commission, which related to drug trafficking as a crime against humanity. Treatment of drug trafficking both as a crime against peace and as a crime against humanity was warranted. However, the new versions of draft articles X and Y (A/45/10, footnote 34) did not pin-point the difference between the two crimes with sufficient clarity. When drug trafficking was a crime against peace, it would have what was described in paragraph 81 of the Commission's report as a State aspect, either on an internal or an international plane. When it was a crime against humanity it would, in most cases, have an impact on a State, on an internal plane affecting large sections of the population; however, Jamaica felt, contrary to the analysis in paragraph 81, that there were cases when drug trafficking could have an international aspect without being necessarily a crime against peace. For example, when the international effect was not such as to pose a threat to international peace or relations, but great harm was done to the population in the producer and consumer countries, the proper classification was a crime against humanity.

71. Both articles X and Y quite properly confined the crime to mass traffic in drugs on a large scale, but the emphasis should be placed more on traffic on a large scale than on mass traffic. If "mass" meant "involving large sections of the population", some types of drug trafficking which existed on a large scale in terms of the quantity being traded might not necessarily involve large sections of the population, and on that account would not qualify as crimes under the Code. It was good that the word "mass" had been deleted from the text of article X as provisionally adopted by the Commission. There was no need to define the term "organized on a large scale", since the question of its meaning could be left to the appropriate court.

72. The main difference between articles X and Y submitted by the Special Rapporteur was that whereas article X was confined to drug trafficking in a transboundary context, article Y dealt with trafficking that might be in the context of a State or in a transboundary context. Jamaica did not believe that distinction to be adequate, for reasons already indicated. More work would have to be done by the Commission in identifying the difference between the two crimes; in view of the difficulty that would be involved in that task, Jamaica was interested in the suggestion, referred to in paragraph 80 of the Commission's report, that it would suffice to identify the crime in question as a crime against the peace and security of mankind.

73. Turning to article X as provisionally adopted, he said that it was difficult to understand the comment in paragraph 1 of the commentary that the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances did not make the crime of illicit traffic an international one.

(Mr. Robinson, Jamaica)

74. Jamaica supported the approach that drug trafficking constituted an offence whether it was engaged in by the agents or representatives of a State or by private individuals; it was also glad to see that the rights of third parties were intended to be protected by paragraph 2 of article X.

75. One of the difficulties involved in drafting a provision such as article X against the background of several multilateral conventions on the same subject was to decide how much of the content of those conventions should be imported into the draft. The definition of illicit traffic in paragraph 3 was based on article 3, paragraph 1 (a) (i), of the 1988 Convention. However, some of the other provisions of article 3, paragraph 1, of the 1988 Convention could arguably be included in the Code, particularly those in article 3, paragraph 1 (a) (ii) to (v).

76. Another difficulty with article X was that the offence it proscribed was not simply illicit traffic in drugs, but rather the undertaking, organizing, facilitating or encouraging of such traffic; it might be that the explanation for that approach was the desire to isolate as a crime against humanity only those aspects of drug trafficking that were most serious and therefore warranted being included in the Code as crimes. But there again a problem of consistency with the 1988 Convention might arise; at any rate, if that approach was being taken, one would at least expect illicit traffic to be defined in a manner that approximated more closely to the definition in the 1988 Convention.

77. Paragraph 3 of article X defined illicit traffic in narcotic drugs as the commission of certain acts "contrary to internal or international law"; the original draft had used the phrase "contrary to the provisions of the conventions which have entered into force". Although Jamaica had seen the dual reference to internal law and international law in certain instruments, it had never really understood it. That formulation seemed to leave unanswered the question of the reconciliation of a conflict between internal and international law. If the purpose of the reference was to ensure that certain acts were excluded from the definition of illicit traffic, then another formulation should be used to achieve that purpose. Jamaica also wondered whether a phrase such as "contrary to applicable international conventions" would not be better than "contrary to international law".

78. With regard to draft article 16 as provisionally adopted by the Commission, on international terrorism, Jamaica considered as narrow the approach which confined the commission of terrorism to agents of the State or representatives of a State, and excluded from the scope of terrorism acts of individuals; the relevant criterion was the effect of the acts committed; if the effect was to destabilize a State and to pose a threat to international peace and relations, then a crime against peace was committed, notwithstanding the fact that the acts had been carried out by private individuals and organizations, as distinct from servants or agents of a State.

(Mr. Robinson, Jamaica)

79. He now wished to turn to the question of the establishment of an international criminal jurisdiction. The resolution of many of the outstanding issues relating to the draft Code was linked to that question. For example, if an international criminal jurisdiction were established, there would be a greater willingness not to deal with certain matters in the context of the Code, and to leave their determination to the relevant court hearing a case under the Code. But if the jurisdiction to hear such cases was to be vested in domestic courts, there would be a reluctance to leave such matters for determination by those courts. On the other hand, if jurisdiction to hear cases under the Code was vested in an international criminal court, there would be a greater inclination to leave the determination of such matters to that court, because of the possibility that a consistent, uniform and coherent body of case-law would be developed by a single court.

80. A consensus had now emerged both in the Commission and in the Committee about the need for the establishment of an international criminal jurisdiction. Jamaica had always argued that the establishment of such a jurisdiction was a necessary concomitant of the establishment of a code of crimes against the peace and security of mankind. It therefore welcomed the initiative taken by the delegation of Trinidad and Tobago at the previous session of the General Assembly calling for the establishment of an international criminal court or other international criminal-trial mechanism to deal with certain offences such as international drug trafficking. It was gratifying to see that the Commission had held a substantive discussion on that question when it had considered the draft Code.

81. In view of the length of time that would be involved in work on the draft Code, it would be prudent for the Committee to consider the establishment of some international trial mechanism that would operate independently of the Code in relation to certain agreed offences.

82. The outline, in paragraphs 103 to 115 of the Commission's report (A/45/10), of the history of the work of the United Nations on the establishment of an international criminal jurisdiction was useful, but would have been even more useful if a summary of the reports on the matter had been given.

83. Paragraph 123 of the report set out three options for the jurisdiction of an international criminal court; the first was that the Court would exercise jurisdiction over the crimes defined in the Code. That was perhaps the most ideal situation; it did, however, have the disadvantage that the establishment of the court would have to await the completion of the preparation of the Code, which represented at least another five years' work. Adoption of the Code by way of a General Assembly resolution or a declaration would make for a shorter period of preparation than adoption of the draft articles as an international convention, the latter method being the preferred course, in Jamaica's view.

84. The second option was that the court would exercise jurisdiction over only some of the crimes defined in the Code. However, as in the first option, the Code would have to be completed for the operation of that option.

(Mr. Robinson, Jamaica)

85. The third option was that the court would be established independently of the Code, to exercise jurisdiction over all crimes in respect of which States would confer competence upon it, particularly under existing conventions. Of the three options, the third was the most practicable; the court would operate totally independently of the Code, on the basis of the agreement of States to confer jurisdiction upon it in respect of certain crimes. It would be possible to reach agreement on a small number of crimes whose characteristics would make the court's work worth while.

86. The third option, which closely approximated the initiative taken by Trinidad and Tobago in 1989, was perfectly consistent with General Assembly resolution 44/39, paragraph 1. The Commission should develop that option at its next session and present the Committee with an appropriate list of crimes.

87. Consideration should be given to extending the jurisdiction of an international criminal-trial mechanism to entities other than individuals; the question of jurisdiction over States would have to be taken up in the wider context of the criminal responsibility of States and of the applicability of the Code to States as the perpetrators of crimes against the peace and security of mankind. No useful purpose would be served by consideration of the question by the Commission at the current stage. However, a great deal of international criminal activity was carried on by organizations which might or might not be legal persons. It would be useful for the Commission to consider jurisdiction in relation to such organizations. It might very well be, however, that where such an organization was not a legal person, for example, a company, but was rather a criminal association of individuals, proceedings would have to be instituted against each member of the association on an individual basis, and not against the association or organization.

88. The Commission appeared to have considered the question of an international criminal jurisdiction in terms of an international criminal court, as distinct from some other international criminal-trial mechanism, which latter possibility was also envisaged by General Assembly resolution 44/39. Jamaica had no difficulty with that approach, since in any event its preference was for an international criminal court.

89. The Commission had also considered the nature of the court's jurisdiction and identified three options. His delegation favoured the first option, in which the court had exclusive jurisdiction. The Commission should explain clearly what was meant by pre-trial examinations. A comparision with domestic legal systems might not help, since different legal systems treated so-called pre-trial examinations differently.

90. With regard to the legal force of judgements in a case of concurrent jurisdiction between national courts and the international court, Jamaica agreed with the statement that a national court should not be able to re-examine a decision of the international court (A/45/10, para. 145). But it did not support the view that the international court ought to be able to re-examine a decision of a national court (para. 146). As far as penalties were concerned, Jamaica believed

(Mr. Robinson, Jamaica)

it would be more desirable to fix a penalty to each crime than to have a general description of penalties.

91. Jamaica would not favour entrusting the International Court of Justice with jurisdiction in criminal matters, since the current members of the Court had not been elected with a view to the exercise of criminal-law functions. An international criminal-trial system should be composed of persons who had been elected on the basis, inter alia, of their qualifications to carry out the functions of judges in such a system.

92. His delegation was gratified to see that the Commission's examination of the question of an international criminal jurisdiction reflected broad agreement, in principle, on the desirability of the establishment of a permanent international criminal court.

93. Although Jamaica favoured the establishment of an international criminal court with exclusive jurisdiction, it recognized that States would have to cede their domestic criminal jurisdiction in relation to crimes falling under the jurisdiction of that court. Moreover, there was also the question of reconciling the surrender by States of national jurisdiction with existing obligations of those States under treaties which gave jurisdiction to each State party in specific cases over certain crimes. Two possible approaches to that latter question might be considered.

94. In the first place, there was the question whether article 30 of the Vienna Convention on the Law of Treaties, which dealt with the application of successive treaties relating to the same subject-matter, was relevant. Could it be said that the international conventions in relation to which States might have to surrender their jurisdiction over certain crimes dealt with the same subject-matter as the Code? It was questionable whether it could be said that, for example, the International Convention on the Suppression and Punishment of the Crime of Apartheid dealt with the same subject-matter as the Code merely because apartheid was one of the crimes covered by the Code. Jamaica doubted whether that proposition could be maintained; after all, the Code, and hence any international convention adopted to implement it, was far more ambitious than any of the international conventions in question. None the less, to the extent that it could be said that those international conventions and the Code dealt with the same subject-matter, the provision of article 30 of the Vienna Convention that would most likely apply would be paragraph 4. In Jamaica's view, the most practicable course would be to insert a provision into the Code corresponding to article 311 of the United Nations Convention on the Law of the Sea, stipulating that the Code, or rather the convention establishing the Code, should prevail, as between States parties, over those international conventions.

95. The second possibility would be to amend the international conventions which gave States jurisdiction over specific crimes so as to give that jurisdiction to an international criminal court established under the Code. If, as was likely, the amendment was done by some of the parties only, the provisions of article 41 of the Vienna Convention would apply.

(Mr. Robinson, Jamaica)

96. A subsidiary but important question was that, although the Commission's report spoke simply of States ceding their jurisdiction to an international criminal court, it might not be easy to determine which State had jurisdiction under the relevant international convention. Moreover, it would be useful for the Commission to deal specifically with the question of the standard of proof required for the conviction of persons tried under the Code. The Code should specify the particular standard (for example, proof beyond a reasonable doubt) by which proof of guilt was established.

97. His delegation believed that the Special Rapporteur's eighth report and the accompanying discussion in the Commission marked a turning-point in the Commission's work on the topic. Although there was obviously a lot of work left on the Code, Jamaica could see draft articles taking on the kind of shape and focus that could lead to their adoption in an international convention.

98. Mr. ALVAREZ (Uruguay) said that Uruguay had always believed that international law should guide relations between States. His country also had always supported the view that the question of the draft Code of Crimes against the Peace and Security of Mankind should be retained as a separate item on the agenda. His delegation endorsed the views expressed by the Minister for Foreign Affairs of the Union of Soviet Socialist Republics in his address to the General Assembly, to the effect that there was a need to provide for the full responsibility of individuals for crimes against the peace and security of mankind.

99. The question whether individuals were subjects of international law had given rise to heated debate within the international community, as some States took the view that recognizing individuals as subjects of international law could threaten the stability of the system of public international law as traditionally understood. They were less cautious, however, when it came to considering the individual as a subject of international duties and individual criminal responsibility arising out of the violation of those duties.

100. On the question of methodology, his delegation considered that complicity, conspiracy and attempt should be included in the part of the Code dealing with general principles. Since there was still no definitive version of the articles on complicity, conspiracy and attempt, it was perhaps premature to comment on them; however, he did wish to mention two concepts which, in view of his delegation, should not be included in the texts of those articles. The latest version of article 15, on complicity (A/45/10, footnote 27), retained (although in brackets), the concept of aiding the direct perpetrator to evade criminal prosecution. The case of an accomplice, or co-author, was clearly different from that of the person guilty of concealment, who was in fact guilty of a separate crime. With regard to proposed article 17 (ibid., footnote 31), he said that its wording was inadequate, since it stated that the attempt to commit a crime was a crime. If the idea was to establish attempt as a separate crime, then the wording should make that clear. His delegation would have no objection to including the second paragraph of the article in the Code, although it would be preferable to include it in the section on general principles.

(Mr. Alvarez, Uruguay)

101. Turning to the articles personally adopted concerning specific crimes (ibid., para. 158), he said he had a reservation with regard to the way in which they had been drafted. The Commission had departed from the traditional approach, whereby specific conduct was classified in terms of the distinction between active and passive subjects of the criminal act. For example, the articles that were now before the Committee included lists of acts without actually defining the crime. Article 16 referred to "the undertaking, organizing ... by the agents or representatives, etc."; however, there was no definition of the specific acts. In the view of his delegation, a wording such as the following would be preferable: "An international terrorist is any person who undertakes, organizes, assists ...". That would be the correct way to define an international crime, and had been the practice followed on previous occasions by those responsible for codifying different aspects of international criminal law.

102. A similar observation could be made with regard to article 18, on the crimes committed by mercenaries. In principle, however, his delegation understood that the text of the Code had been made consistent with the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. At any rate, it should be noted that the Convention contained two articles which dealt with mercenary activities, such as recruiting, using, financing or training mercenaries, and with the attempt to commit one of those offences. The Convention, however, also expressly defined the crime of mercenary activity. In the Convention, it was clear that the mercenary was a criminal. In the draft Code before the Committee, those who took part in recruiting, using, financing or training mercenaries were viewed as criminals, but the mercenary himself was not mentioned as a person guilty of a crime against the peace and security of mankind. Hence, a mercenary could be prosecuted under the Convention, but not under the Code. That was a contradiction, considering the approach that had been taken in drafting the Code, since, in the final analysis, under the hypothesis envisaged in article 16 as provisionally adopted, a mercenary might be a representative of the State or have a very similar status.

103. Turning to article X, on illicit traffic in narcotic drugs, he said that the drafting of paragraph 1 should be improved. The scope of the article, especially with regard to its transboundary application, should be more clearly defined. Paragraphs 2 and 3 represented a considerable effort at summarizing concepts, but the description of conduct or activities covered by the article should be expanded and brought into line with article 3 of the 1988 Vienna Convention.

104. On the question of the establishment of an international criminal jurisdiction, he said that as far as subject-matter was concerned, the proposed court should exercise jurisdiction only over the crimes defined in the Code. As far as competence over persons was concerned, it should exercise jurisdiction, first and foremost, over individuals. As to the nature of jurisdiction, his delegation held that the court should have exclusive jurisdiction. A system might be set up to operate during the period of transition between the system of exclusive jurisdiction of national courts and that of the exclusive jurisdiction of the international court.

(Mr. Alvarez, Uruguay)

105. It would be premature to examine purely procedural questions relating to the composition of the court, the election of judges or the establishment of other bodies. He did wish, however, to bring up the question of the institutional structure of the court and the matter of penalties. As for the institutional structure, his delegation held that the court should be established within the framework of the convention adopting the Code, but its statute could be embodied in an additional protocol providing for the establishment and organization of a court or simply accepting the jurisdiction of the court should it have been established under the original convention. The court should not, however, be established as an organ of the United Nations, because that would entail the necessity of adopting a complicated set of amendments which, moreover, would not make any positive contribution. Finally, on the question of penalties, he said that his delegation was adamant in its opposition to the inclusion of the death penalty.

106. In conclusion, he expressed the satisfaction of his delegation at the fact that the International Law Commission had taken up the controversial but crucial issues of international terrorism, mercenary activities and drug trafficking.

107. Mr. WINKLER (Austria), remarking on the difficulty of passing judgement on the work done by the Commission so far on the draft Code as a whole, said that the task was not made easier by the fact that some draft articles proposed and discussed, but not finalized, bore the same number as some of the draft articles already adopted. While recognizing that such duplication could sometimes not be avoided, his delegation strongly recommended that the numbering of the articles should be rearranged for greater convenience.

108. With regard to the question whether the draft Code should cover breaches of treaties designed to ensure international peace and security, a point on which the Commission was explicity seeking the Committee's guidance, he recalled that his delegation had in the past taken the position that such a provision would have to be drafted with the greatest care so as not to violate the principle of non-discrimination, and that, moreover, it should cover only the most serious breaches of treaties having a universal scope of application which, in view of their scale or their nature, constituted a threat to international peace and security. Those views were confirmed by the discussion in the Commission as reported in paragraphs 89 to 92 of the report (A/45/10), and his delegation therefore agreed that the Commission should revert to draft article 17 only after the completion of its consideration of the other draft articles on the topic.

109. Turning to the three draft articles proposed by the Special Rapporteur in his eighth report, he said that, in his delegation's opinion, it was not possible to give a general answer to the question of whether complicity, conspiracy and attempt should be treated as separate offences or grouped together under the heading of general principles; the nature of the crime and the specific form of participation would have to be taken into account in each particular case. So far as complicity was concerned, his delegation would favour the inclusion in the appropriate section of the draft Code of a general principle on various forms of participation in a crime before it was committed, to the effect that all participants in the crime

(Mr. Winkler, Austria)

should be treated in the same manner as the principal perpetrator. If the provision were drafted in sufficiently general terms, it would still be possible to include a particularly grave act, already covered by the general provision on conspiracy, as a separate offence in the list of crimes. As for complicity after the commission of the crime by the perpetrator and his accomplices, his delegation felt that it should constitute a separate offence; all participants would then be treated as "perpetrators". The degree of fault, which might be different, would have to be taken into account in sentencing.

110. His delegation would favour a similar approach in the case of attempt. A general principle stating that the attempt to commit a crime should be treated in the same manner as the actual commission of the crime should be included in the draft, but the fact that the attempt did not lead to the commission of the crime might entail a lesser sentence than if the crime had actually been completed. It might be useful, however, to include a provision to the effect that an attempt to commit a crime under circumstances which could not possibly lead to the actual commission of the crime would not entail criminal responsibility.

111. While agreeing that conspiracy should be included as a separate offence in the list of crimes, his delegation considered it essential that the offence of conspiracy should be clearly defined so as to avoid any overlap with complicity or attempt. It should also be made very clear that all participants in the conspiracy actually committed the same crime and were subject to punishment in accordance with their respective roles in the conspiracy.

112. Turning to the three articles provisionally adopted by the Commission at its forty-second session, he said that article 16, on international terrorism as a crime against peace, was still incomplete. As stated in the footnote on page 63 of the English text, it would be reviewed in the light of the provisions on complicity and on crimes against humanity, to be examined by the Commission at a later stage. As it stood, the article dealt only with acts of terrorism of a State against another State, and did not purport to cover internal terrorism. With that restrictive scope of application in mind, and pending further elaboration of the subject in the context of crimes against humanity, his delegation's first preliminary reaction to the draft was favourable. From the point of view of criminal legislation, however, it could not help feeling somewhat uneasy about the use of so subjective a criterion as the effect of an act upon the minds of individuals. While it had no specific proposal to make at the present stage, it would welcome further efforts on the part of the Commission to arrive at a more objectively formulated definition.

113. Draft article 18 relied to a large extent on the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and was acceptable.

114. His delegation welcomed the inclusion of a provision on illicit traffic in narcotic drugs (art. X), and was satisfied in principle with the proposed wording, although the scope of the article ratione personae would have to be reviewed at a

(Mr. Winkler, Austria)

later stage in the light of the provision on complicity. However, it would prefer the forms of participation in the crime listed in paragraph 2 of the article to be made punishable separately. It also wished to propose the addition of the words "or must have known" after the words "who knows" in paragraph 2, so as to cover cases where it could not be proved that the individual in question actually had knowledge of the criminal origin of the funds, but would have known had he applied the diligence required under the specific circumstances.

115. Lastly, referring to the question of the establishment of an international criminal jurisdiction, he said that his delegation continued to take the view that such a step would be only logical, since it seemed doubtful whether a Code unaccompanied by an international criminal jurisdiction would have the desired effect. However, given the highly sensitive nature of the question, the possibility of establishing an international criminal court in the foreseeable future had to be viewed with scepticism. The favourable developments in international relations in general, and the willingness of all segments of the international community to respond to grave breaches of international peace and security in accordance with the Charter of the United Nations and other available instruments might, of course, make future prospects for the exercise more realistic than ever before; nevertheless, his delegation wished to recommend a cautious approach.

116. With reference to specific points discussed by the Commission in dealing with the subject, he stressed that his comments would be of a very general nature and were not intended to represent final positions. With regard to the court's jurisdiction and competence, his delegation had a marked preference for the first of the three alternatives listed in paragraph 123 of the report (A/45/10); any other solution would create confusion and would not be conducive to the course of justice. As to the nature of the court's jurisdiction, his delegation would opt for the third of the three options presented in paragraph 130, since to expect States to renounce national criminal jurisdiction altogether would be unrealistic, while the option of concurrent jurisdiction between an international criminal court and national courts would give rise to such complicated problems that the disadvantages of such a solution would by far outweigh its benefits. An in-depth discussion of other questions arising in connection with the topic seemed premature. In general, his delegation considered that it would be more efficient to leave aside the question of an international criminal court for the present, and to concentrate on the substance of the draft Code.

AGENDA ITEM 144: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/45/L.3)

117. The CHAIRMAN announced that Brazil, Ecuador, New Zealand and the Philippines had joined the sponsors of draft resolution A/C.6/45/L.3.

LETTER FROM THE PRESIDENT OF THE GENERAL ASSEMBLY TO THE CHAIRMAN OF THE SIXTH COMMITTEE DATED 16 OCTOBER 1990 (continued)

118. The CHAIRMAN recalled that, at the 18th meeting, he had drawn attention to a letter from the President of the General Assembly, transmitting a letter from the Chairman of the Fifth Committee requesting delegations' views on agenda item 119, entitled "Programme planning". In accordance with the relevant decision adopted by the Sixth Committee, he had forwarded the letter in question to the Chairmen of the five regional groups, with a request that they should transmit their comments to him by 7 November. He had so far received no comments. He therefore urged the regional groups to submit any comments that they wished to make to him as soon as possible, in order to enable him to comply with the request made by the Chairman of the Fifth Committee.

The meeting rose at 1 p.m.

UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
32nd meeting
held on
Tuesday, 6 November 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 32nd MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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Distr. GENERAL
A/C.6/45/SR.32
23 November 1990
ENGLISH
ORIGINAL: FRENCH

90-56907 3131S (E)

The meeting was called to order at 3.05 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Mr. CHRISTOFFERSEN (Norway), speaking on behalf of the five Nordic countries, namely, Finland, Iceland, Denmark, Sweden and his own country, first of all recalled that the Sixth Committee had repeatedly pointed out that it would be more to the purpose if the Commission were to present either the whole draft Code or at least a section of it, rather than submit a few articles each year to the Sixth Committee for comments. Asking for comments on an incomplete penal code would certainly not have been approved at the national level.

2. The aim of the draft Code must be to achieve increased international co-operation in order to combat crimes against the peace and security of mankind and to ensure that individuals who committed specific serious crimes were brought to justice and convicted by a competent court. In the view of the Nordic countries, any penal system basically comprised three elements.

3. The first of those elements was a definition of the offences. The draft Code should contain an exhaustive list of the offences which should be considered crimes against the peace and security of mankind and which should thus be covered by the Code. That must be the approach in order to comply with the principle of nullum crimen sine lege. The second element in any penal system was an indication of the penalties. In conformity with the principle of nulla poena sine lege, the draft must explicitly state the penalties for the various offences. The third element was the establishment of a judicial organ to implement the system. In that connection, the International Law Commission deserved credit for the competence and expedition with which it had responded to the request by the General Assembly on the question of establishing an international criminal court. The significance of the Commission's work was even more apparent in the light of the fact that the question had been based on the proposal, submitted by Trinidad and Tobago at the previous session of the General Assembly, regarding the establishment of an international criminal court with jurisdiction in cases relating to illicit traffic in narcotic drugs.

4. The delegations of the Nordic countries continued to think that it would be worthwhile to consider including in the draft Code an overall definition of the wrongful act. Draft article 19 of the draft articles concerning State responsibility set the criterion of seriousness in a more conceptual scope. A similar provision could also be included in the draft Code of Crimes against the Peace and Security of Mankind. The current structure, in which wrongful acts were described in separate provisions, underlined the need for a specific definition of the notion of gravity. There should also be a clear distinction between international delicts and international crimes; such a distinction would also be of vital importance when dealing with complicity, conspiracy and attempt.

(Mr. Christoffersen, Norway)

5. With regard to the draft article on international illicit traffic in narcotic drugs (A/45/10, footnotes 32 and 34), the delegations of the Nordic countries saw no practical reason to have two separate provisions identifying the illicit traffic in narcotic drugs as a crime against peace, on the one hand, and as a crime against humanity, on the other. In general terms, the Commission should examine whether it was in fact useful for the Code to contain separate provisions identifying crimes against peace and crimes against humanity.

6. The "related offences", namely complicity, conspiracy and attempt, should not be included as separate crimes, but should be placed in the general part of the Code, together with the identification of the perpetrator. It would then be left to the appropriate court to determine whether the level of participation in a crime had been sufficient to make a person a perpetrator on the basis of complicity. Furthermore, a general definition of conspiracy and of attempt should be provided.

7. The delegations of the Nordic countries supported the Special Rapporteur's view that the Code should deal with large-scale illicit trafficking in narcotic drugs by associations or private groups, or by public officials, either as principals or as accomplices in the trafficking, and at the national and international level, since they believed that all possible means of combating international illicit traffic in narcotic drugs should be explored. In that connection, they noted that draft article 16, on international terrorism, and draft article 18, on the recruitment, use, financing and training of mercenaries, as provisionally adopted by the Commission, (ibid., para. 158), excluded the acts of private individuals or groups, notwithstanding the serious nature of such acts. The delegations of the Nordic countries urged the Commission to reconsider that issue when it reverted to the problems relating to the attribution of such crimes to individuals. In that respect, it was important to be aware of the linkage that could often be found between terrorism, mercenaries and illicit trafficking in narcotic drugs.

8. Although the Nordic countries had previously stated in the Sixth Committee that they were not convinced of the desirability of establishing an international criminal court, the Nordic delegations, bearing in mind the general developments that had taken place in the international situation, had changed their views and would not exclude, a priori, encouraging the Commission to pursue its work on the topic. In that connection, they considered that the establishment of an international criminal court must be considered in connection with the content of the Code. No decision could be made until the whole draft was available. A series of questions would then have to be resolved, including extradition, the obtaining of evidence and the conduct of investigations, in addition to the structure of the court, its rules of procedure and the nature of its jurisdiction.

9. The delegations of the Nordic countries believed that it was important for States to take measures to establish jurisdiction of their own and, in that context, they drew attention to article 4, paragraph 2 (b), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In their view, the best point of departure would be the principle of concurrent

(Mr. Christoffersen, Norway)

jurisdiction between an international criminal court and national courts, provided that the required procedure for appeal, which was a basic element of any penal system, could be met. They would, however, only be able to comment on resolution 25 adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders after they had studied that idea further.

10. In the view of the Nordic Governments, it would be of the greatest benefit to the Committee to see the complete draft before discussing the idea of an international criminal court further. The draft Code should include all aspects of organizational, procedural and material matters, including, of course, the economic consequences of the proposal.

11. In particular, the Special Rapporteur had drawn the Sixth Committee's attention to the divergence of views which had manifested itself in the Commission as to the advisability of covering in the draft Code breaches of treaties designed to ensure international peace and security. The Nordic countries, for their part, were not in favour of dealing with that topic in the Code, partly because such articles might make the Code less acceptable and partly because it would raise fundamental questions of treaty law, notably in the area of the validity and interpretation of treaties, relations between the States parties and the position of third States vis-à-vis treaties.

12. Finally, the delegations of the Nordic countries remained convinced that there was no good reason for retaining the draft Code as a separate item on the agenda of the Sixth Committee. On the contrary, it should be discussed as part of the report of the International Law Commission.

13. Mr. CRAWFORD (Australia) referred to draft article 15 (A/45/10, footnote 27) of the draft Code of Crimes against the Peace and Security of Mankind, which dealt with complicity and which he considered too wide and imprecise, despite a number of improvements. The draft article defined as acts of complicity "aiding, abetting or provision of means to the direct perpetrator, or making him a promise". The provision of means, however, would only be an offence if the provider knew that those means were going to be used to commit a crime. As to the making of a promise, if that were considered as a separate element of complicity, it should be specifically related to the commission of the offence and should be known to the promisor to be so related.

14. With regard to large-scale trafficking in drugs, he expressed a preference for draft article Y (ibid., footnote 34) since, although such traffic was indeed a crime against humanity, it was not in itself a crime against peace.

15. With regard to draft article 17 concerning breach of a treaty designed to ensure international peace and security (ibid., para. 89), on which the members of the Commission had been unable to agree, his delegation was of the view that the draft Code should contain only offences of universal scope, and that it did not fall within the framework of the draft Code to penalize acts contrary to bilateral or multilateral treaties. As to the basic principles of international law relating

(Mr. Crawford, Australia)

to the maintenance of peace and security, those were covered by other provisions of the draft Code. Draft article 17 should therefore be deleted.

16. It was helpful for the Commission to discuss the question of establishing an international criminal court, for two reasons. The first, a general one, related to the danger of unilateral, wrongful interpretations of the draft Code by certain States, especially given the highly political nature of the charges that could be brought under the draft Code. The second, more specific, reason was that some major crimes, such as drug trafficking on a large scale, threatened to exert pressure on the judicial system of some small States. The draft Code would be unacceptable without guarantees against unilateral and partisan interpretations. In addition, States should have the option of resorting to an international criminal jurisdiction in cases where their judicial systems were not able to cope with a particular category of offences.

17. The question of establishing an international criminal jurisdiction required further study. He invited the Commission to give consideration to the following points. First, such jurisdiction should be established by a protocol annexed to the draft Code and should cover only the offences laid down in that protocol. Second, it was necessary to establish concurrent jurisdiction which did not preclude the jurisdiction of national courts, except in certain cases. The court should be available to all States parties to the draft Code; it should not be a permanent body and should be funded, for the most part, on a "user pays" basis. The pre-trial examination procedures should be carried out by the referring State in accordance with its law, and that State should be required, in any case, to produce evidence capable of supporting a conviction. The judgements of the court should have the effect of precluding any new prosecution for the same or a related offence arising out of the same facts, in accordance with the principle of non bis in idem. Lastly, any penalty of imprisonment imposed should be served in the prosecuting State's penal institutions in accordance with the Standard Minimum Rules for the Treatment of Prisoners, although States parties could have the option of providing for other forms of detention.

18. In most cases, given adequate guarantees of due process, national criminal jurisdiction would be the normal method of implementing the provisions of the draft Code. However, experience had shown that there were cases in which national jurisdiction was not enough, and he commended the Commission for having undertaken the difficult task of exploring those issues.

19. Mr. MOMTAZ (Islamic Republic of Iran) noted with satisfaction that the elaboration of the draft Code of Crimes against the Peace and Security of Mankind had reached an active phase. With regard to Part One of the draft, dealing with complicity, conspiracy and attempt, his delegation was of the view that those acts constituted separate offences and should therefore be characterized and defined separately. The Special Rapporteur appeared to have taken an entirely sensible approach in that regard.

(Mr. Momtaz, Islamic Republic of Iran)

20. The new version of draft article 15 on complicity (A/45/10, footnote 27) was more satisfactory than the previous one, but it would be a good idea to make it clear that complicity applied not only to crimes against the peace and security of mankind but also to attempt and conspiracy. With regard to the definition of complicity, it would be necessary to reduce its scope by limiting the applicability of the draft article to intentional acts. Likewise, in the case of crimes against peace and crimes against humanity, care should be taken not to apply the concept of complicity as it was understood in traditional criminal law. Similarly, it would not be reasonable to charge individuals with complicity in an international crime if all forms of resistance would have proved futile. In all such cases, greater discretion should be left to the judge in determining, in each specific case, the role of the various participants and the link between the act and the perpetrator.

21. He noted with satisfaction that subparagraph (b) mentioned incitement, which was closely related to propaganda, and which he wished to see expressly prevented and punished at the international level; it would be wrong to underestimate the control which belligerent and racist propaganda could exert over the masses or to invoke freedom of expression, information or the press in tolerating such activities.

22. The new version of draft article 16 on conspiracy (ibid., footnote 29) was not very satisfactory, and he preferred the original version. The desired objective was to combat the idea that no individual was responsible for collective crimes. The original version of the draft article was much more explicit in that regard. There was no doubt that crimes such as genocide and apartheid could not be committed by isolated individuals but arose from a common plan involving joint responsibility as well as individual responsibility. It should be noted, however, that joint responsibility did not necessarily imply collective punishment, because the mere fact of belonging to a group could not be viewed as an act of complicity. The second alternative text of paragraph 2 of the original version of draft article 16 was closer to that concept.

23. He supported the inclusion of a provision on attempt in the draft Code, in spite of the difficulties which would inevitably arise from its implementation owing to the fact that a mere attempt was not treated as a punishable act under the legislation of some countries. It should be noted, however, that an attempt should be regarded as a commencement of execution. The definition of attempt would not, of course, be complete without the moral element included in the draft Code by the Special Rapporteur, namely, the failure or halting of the act only because of circumstances independent of the perpetrator's intention. He approved of the inclusion of that definition in the new version of draft article 17.

24. His country, which was waging an all-out battle against illicit drug trafficking, could only welcome the draft article on that topic submitted by the Special Rapporteur. There was no doubt that organized drug trafficking on a large scale constituted an attack on the right to life, physical integrity and health which could be compared to a form of genocide. Under those circumstances, he could not fail to support the idea of characterizing the offence in question as both a crime against peace and a crime against humanity.

(Mr. Momtaz, Islamic Republic of Iran)

25. He supported the idea of including in the draft Code an article concerning breach of a treaty designed to ensure international peace and security. Such a provision would reflect the universal condemnation evoked by the breach of treaties. The same consideration applied to the use of chemical weapons, which had been banned by the 1925 Geneva Protocol and should be regarded as a crime against the peace and security of mankind. Moreover, such a characterization appeared to conform to the definition of a State crime provided by the Commission in article 19, paragraph 2, of its 1976 draft articles on State responsibility.

26. With regard to the establishment of an international criminal jurisdiction and the various options presented by the Special Rapporteur, he believed that it would be useful for some offences to be brought before an international jurisdiction, especially very serious offences, such as aggression and those involving State responsibility. Only an international court would have the authority and impartiality necessary to try the most serious crimes on behalf of mankind. In fact, the two systems of prevention and punishment, national and international, should be linked. As provided for in the second model submitted by the Special Rapporteur (A/45/10, para. 155), States would not have to cede their national jurisdiction but could decide to submit certain cases to the international criminal court.

27. Inasmuch as some international conventions provided for the possibility of submitting the prevention and punishment of international crimes to an international judicial body, it would undoubtedly be preferable for the jurisdiction in question to be established independently of the draft Code, so that it could cover any matter with regard to which States conferred competence upon it. As for the submission of cases to such a court, he thought that it was not necessary to require the consent of the States concerned. Unilateral submission of a case by any State party to the statute of the court was unquestionably a legal innovation, the implementation of which threatened to create difficulties. That approach, however, was part of the trend towards vesting in States an objective right to the maintenance of peace. The question arose more specifically in connection with draft article 12 concerning cases in which the Security Council might conclude that an act of aggression had been committed.

28. Lastly, he wished to stress the need to determine a scale of penalties in accordance with the principle of fitting the punishment to the crime. In that connection, his delegation would favour a general list of applicable penalties, leaving the judge free to apply the appropriate penalty in each particular case. The value of the Code as an instrument for the punishment of crimes would depend upon it.

29. His delegation hoped that the General Assembly would continue to give high priority to the preparation of the Code of Crimes against the peace and security of mankind and to the Commission's work on the topic.

30. Mr. AL-BAHARNA (Bahrain) welcomed the progress achieved by the Commission at its last session on the draft Code of Crimes against the peace and security of mankind, one of the most important topics on its agenda.

31. With regard to the methodology adopted by the Commission in the formulation of draft articles on complicity, conspiracy and attempt, the question before the Commission had been whether complicity, conspiracy and attempt should be placed in the part of the draft Code dealing with general principles, or should be treated as separate crimes, or should be examined in relation to each of the crimes covered by the Code. The last-mentioned solution would, of course, be ideal, but he agreed with the Special Rapporteur that the task was an impossible one. The first solution, that of including the concepts concerned in the part dealing with "general principles", appeared doubtful because an accomplice often incurred the same degree of liability in law as the principal. In the event, complicity and conspiracy could be treated as separate crimes under the draft Code. His delegation thought, however, that attempt should if possible be examined in the context of specific crimes or groups of crimes.

32. As to draft article 15 on complicity, his delegation considered that the new version proposed by the Special Rapporteur represented a marked improvement over the original version. It was right that every person associated with a crime under the Code, whether he be an originator of the crime or merely an executor, should be inculpated. That was all the more necessary as the crimes to be covered by the Code were invariably committed by a number of persons. Care should be taken, however, to ensure that the persons inculpated had acted intentionally or in the knowledge that they were committing an unlawful act. So long as that condition was met, there could be no objection to holding all the persons involved in the crime culpable under the Code. Subject to that consideration, his delegation supported the main thrust of article 15, which included within its scope all the persons involved in the perpetration of the crime in question. As to whether the notion of complicity should include not only acts prior to or concomitant with the principal offence but also subsequent acts, his delegation would support the latter solution provided that there was a nexus between the principal offence and subsequent accessory acts. From the point of view of form, the new version of article 15 could bear improvement; a literal reading of the first paragraph conveyed the impression that it contained the definition of the crime of complicity whereas, in reality, the definition was contained in subparagraphs (a), (b) and (c) of the second paragraph. His delegation would urge the Commission to re-examine the text of article 15 with a view to making that point clearer.

33. The revised text of draft article 16 also marked a considerable improvement over the original version. His delegation shared the Commission's view that "the notion of conspiracy had been finally recognized in international law". Some questions of a conceptual nature still remained, however, for example the question whether the text should specifically include the criminal intent (mens rea) and, secondly, whether it was really necessary to have complicity and conspiracy as separate crimes or whether they could be dealt with under the general rubric of "participation in a crime". His delegation took the view that the definition of conspiracy should specifically refer to mens rea as an additional element. As to

(Mr. Al-Baharna, Bahrain)

the second question, his delegation had no strong views on the matter and would support the approach which had a reasonable prospect of acceptance by the largest number of States. Lastly, he remarked that a neater definition could be accomplished by combining the two parts of the article in a single provision.

34. The new version of draft article 17 was likewise a marked improvement over the original version, even if controversy still persisted as to whether attempt should be included in the draft Code at all, and whether the concept of attempt should be limited to certain crimes only, namely, crimes against humanity. His delegation found it difficult to answer those questions at the present stage; the Special Rapporteur's views, as reflected in the first two sentences of paragraph 76 of the report, deserved consideration in that respect. Although the solution appeared to be grounded in an analogy with municipal law, it seemed reasonable and acceptable. His delegation supported draft article 17 in principle but recommended that its two paragraphs should be combined and certain drafting improvements made in the text by the Commission's Drafting Committee.

35. His delegation also welcomed the progress achieved by the Commission at its last session by the adoption of article X on illicit traffic in narcotic drugs. It considered that the purposes of the draft Code would be adequately served by article X postulating that drug trafficking was a crime against humanity without specifying that it was also a crime against peace. The draft article was welcome inasmuch as it included within its ambit every conceivable act connected with the crime in question while at the same time excluding isolated or individual activities of small dealers. His delegation was also glad to note that the scope of the article extended to money laundering operations.

36. With regard to the question of breach of a treaty designed to ensure international peace and security, he noted that the Chairman of the Commission's Drafting Committee had informed the Commission that irreconcilable views had prevented agreement being reached on draft article 17 concerning that issue. Not surprisingly, the discussion in the Commission itself had revealed the same picture. In paragraph 91 of the report it was stated that many members had felt that an article on the topic would not only violate the principle of universality but would also involve questions of treaty law, such as the validity and interpretation of treaties, relations between parties to treaties and the question of treaties and third States. His delegation shared the concern of those members of the Commission who had been critical of the proposed article on the ground that "an article of such a controversial nature would have an adverse impact on the acceptability of the Code".

37. Mr. GUIBILA (Burkina Faso) recalled that at the initiative of Trinidad and Tobago an item relating to the establishment of an international criminal court with jurisdiction over individuals and entities engaged in illicit trafficking in narcotic drugs had been placed on the agenda of the General Assembly and that the latter had, in its resolution 44/39, requested the International Law Commission to address that question when considering the draft Code of Crimes against the peace and security of mankind. The possibility of establishing an international criminal jurisdiction had always been envisaged by the Commission.

(Mr. Guibila, Burkina Faso)

38. His delegation, for its part, supported any initiative or mechanism aimed at the just and effective implementation of the Code being drafted. It felt, however, that the drafting of the Code and the establishment of the organ or organs entrusted with its implementation should proceed by stages. In other words, the Commission should, in the interests of efficiency and of rationalizing its work and with a view to avoiding undue dispersal of its efforts, complete the drafting of the Code before tackling the question of its implementation. Such an approach would in no way detract from the contents of the draft Code, as was made clear by paragraph 3 of draft article 4 which provided that the obligation of national courts to try or extradite did not prejudge the establishment and the jurisdiction of an international criminal court.

39. In his delegation's view, the Commission should draw up a list of crimes, each of which should be very clearly defined, and also a list of applicable penalties. So far, the Commission had worked only on the definition of crimes under the Code, and it was time for it to consider the question of penalties to go with their crimes.

40. His delegation welcomed the consensus within the Commission in favour of the inclusion of international terrorism, mercenarism and illicit drug trafficking as crimes under the Code. It fully approved the text of article X on illicit drug trafficking, a provision which took account of all aspects of that scourge. It hoped that proclaiming drug traffic, whether in the context of a State or in a transboundary context, as well as the laundering of funds derived from such trafficking to be crimes under the Code would contribute towards the complete eradication of one of the century's worst evils. As for adding narco-terrorism to the list, that did not seem necessary, since narco-terrorism was in fact a consequence of illicit drug trafficking, already proclaimed a crime under the Code.

41. Burkina Faso was pleased that a revised version of articles 15, 16 and 17, on complicity, conspiracy and attempt, had been submitted. The new version of article 15 was a great improvement on the former one because it was descriptive, more detailed and more precise; since interpretation was restrictive in criminal law, drafting must always be precise and clear. The new version of article 17, on attempt, filled the legal lacuna left by the former text, which had not defined attempt.

42. Even though Burkina Faso encouraged compliance with treaties and international agreements, whatever their purpose, for a number of reasons it was unable to support description of breach of a treaty as a crime in the draft Code, even if the treaty concerned was designed to ensure international peace and security. Firstly, treaty obligations had a relative effect, an *interpartes* effect, and only the parties to a treaty could take advantage of its positive effects or complain that it had been breached. Secondly, describing breach of a peace treaty as a crime would discriminate against, and constitute an unprecedented injustice in respect of, States that had entered into such treaties, as compared to States that had not done so, and would not encourage the latter to do so.

(Mr. Guibila, Burkina Faso)

43. Burkina Faso believed that instead consistent failure to observe and implement relevant Security Council resolutions should be described as a crime under the draft Code. Some situations upon which the international community's attention was still focused, where international peace and security were at stake, existed because the relevant Security Council resolutions were not universally respected. The continued existence of apartheid in South Africa and the conflicts in the Middle East, to name just a few cases, were striking examples of such situations.

44. Mr. SCHAETTI (Observer for Switzerland), noting that at its forty-second session the Commission had had before it the Special Rapporteur's eighth report on the draft Code of Crimes against the Peace and Security of Mankind, said that the Special Rapporteur's commitment and competence would be much needed in order to complete an undertaking that was quite controversial in political terms.

45. The Special Rapporteur's report was made up of three parts, the third of which, on the statute of an international criminal court, had been of particular interest to his delegation. Part three, which took the form of a questionnaire-report, contained various options and versions, on which the Swiss authorities did not as yet have a definitive opinion. Although one might well endorse the principle of establishing an international jurisdiction to try perpetrators of crimes against the peace and security of mankind, a number of questions arose as to the competence of such a jurisdiction, such as whether the jurisdiction in question would be exclusive or concurrent. Switzerland believed that exclusive competence should not be considered, so as to avoid devaluing or even disrupting, domestic efforts to suppress the crimes in question, or reducing the effect of judgements handed down by domestic courts. It would be paradoxical if the existence of a court were to have a "demobilizing" effect on State judicial authorities.

46. The question was whether it should be concluded that concurrent competence was appropriate. Switzerland believed that such a formula would give rise to difficulties in the event that one party wished to bring an action before a national jurisdiction, while the other party wished to bring it before the international court. Furthermore, that solution would not guarantee uniform implementation of the Code, because it would entail a risk of divergent interpretations.

47. It might therefore be asked whether the international criminal court should be regarded above all as a court of appeal, which would review domestic judgements. For example, a case could be reviewed because: the State concerned had grounds for believing that the decision in question had not been based on a proper appraisal of the law or the facts; the acts had been tried as ordinary crimes and not on the basis of the Code; or the individual or individuals convicted had filed an appeal. Switzerland recognized that it could be objected that the existence of a jurisdiction having a review competence might diminish the authority of res judicata, particularly where the decision in question had been handed down by the supreme court of the State concerned. However, the establishment of such a court would be altogether in keeping with the contemporary evolution in the

(Mr. Schaetti, Observer, Switzerland)

relevant area of law, which increasingly permitted individuals to have their domestic courts' decisions reviewed by an international jurisdiction. A court of appeal would offer the additional advantage of ensuring that individuals convicted by domestic courts could have their cases reviewed. Moreover, such an international jurisdiction could also, where appropriate, settle positive or negative disputes between States concerning competence.

48. With regard to the court's competence ratione materiae, the court should basically try and punish crimes laid down in the Code. Switzerland recognized that the concept of an international crime was broader than that of a crime against the peace and security of mankind. However, in order to avoid having its role devalued and robbed of its originality, the court should have competence only in respect of the most serious acts, the acts dealt with in the Code. Furthermore, Switzerland hoped that the Code, to a greater extent than other instruments making certain acts international offences, would lay down a definition of the crimes in question that met the requirements of criminal law. That was to say, as a result of the particular care taken in drafting the Code, the assumption could be made that it would contain sufficiently precise rules to form the basis for making an act a crime, in accordance with the inviolable principle nulla poena sine lege, whereby a penalty could be imposed only where there was a violation, either by commission or omission, of a clearly enunciated legal provision. Obviously, that option meant that the court could not be established until work on the draft Code had been completed. That was not a drawback, however, in view of the extent to which the substance of the law was linked to the corresponding implementation procedures.

49. At its forty-second session the Commission had also considered articles 15, 16, and 17, on complicity, conspiracy and attempt, respectively. His delegation reserved the right to return to those subjects at a later date, once the articles had been dealt with by the Drafting Committee. However, it wished to comment on the articles provisionally adopted by the Commission, on international terrorism, the recruitment, use, financing and training of mercenaries, and illicit traffic in narcotic drugs.

50. On the issue of the crime of international terrorism, depending on the specific circumstances, it might not be possible to draw a clear distinction between the ingredients of international terrorism and those of intervention, described as the act of intervening in the internal or external affairs of a State and encouraging subversive or terrorist activities. One might ask, for example, which of the two relevant provisions covered financing by a State agent of armed groups for the purpose of spreading terror in a given population and thus promoting the fall of the Government of another State.

51. The commentary on article 18, entitled "Recruitment, use, financing and training of mercenaries", set out in paragraph 158 of the Commission's report, called for a comment. The Commission recalled that under article 47 of Additional Protocol I of 1977 to the Geneva Conventions, a mercenary did not have the right to be a combatant or a prisoner of war. Two clarifications were called for. That provision permitted a party to the Protocol to deny that right to a mercenary; it

(Mr. Schaetti, Observer, Switzerland)

did not oblige a party to the Protocol to do so. Furthermore, a mercenary without the right to be a combatant or a prisoner of war benefited, as did any civilian definitely suspected of activities hostile to the security of the State, from article 5, third paragraph, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, which in particular guaranteed him, in case of trial, the rights of fair and regular trial. In any event, he would be covered by article 75 of Additional Protocol I to the Geneva Conventions. That was why article 16 (b) of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the General Assembly in 1989, contained a reservation concerning international humanitarian law. In Switzerland's view, such a provision should be included in article 18 of the draft Code.

52. Lastly, it might be asked whether there was any justification for including in the Code a provision on international traffic in narcotic drugs. Such traffic could in fact be regarded as an offence under ordinary law, motivated basically by the lure of the prospect of financial gain. However, such an assessment ignored developments that had revealed increasingly close links between international traffic in narcotic drugs and both local and international terrorism. It was not without reason that references were commonly made to narco-terrorism. In addition to the negative effect that it had on the health and well-being of individuals, international traffic in narcotic drugs had a destabilizing effect on some countries and thus constituted an obstacle, as the Commission relevantly remarked in its report, to harmonious international relations. Such traffic did appear to be both a crime against peace and a crime against the security of mankind. There was therefore reason to include in the draft Code, even if only as a provisional working hypothesis, a provision describing such traffic as a crime. However, the Commission would have something to gain from studying in greater depth the relationship between that provision and the corresponding provision in the United Nations Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which set up a universal competence, by giving international or regional organizations the authority to prevent the crime in question or to seek its perpetrators.

The meeting rose at 4.30 p.m.

UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
33rd meeting
held on
Wednesday, 7 November 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 33rd MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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Distr. GENERAL
A/C.6/45/SR.33
14 November 1990

ORIGINAL: ENGLISH

90-56949 3005S (E)

The meeting was called to order at 10.10 a.m.

EXPRESSION OF SYMPATHY IN CONNECTION WITH THE RECENT EARTHQUAKE IN THE ISLAMIC REPUBLIC OF IRAN

1. The CHAIRMAN, on behalf of the Committee, expressed sympathy in connection with the recent earthquake in the Islamic Republic of Iran.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

2. Mr. CALERO RODRIGUES (Brazil), speaking on agenda item 140 (chap. II of document A/45/10), referred first to the three draft articles proposed by the Special Rapporteur in part one of his eighth report. His delegation continued to hold the view that there were no grounds for introducing the concept of "related offences" or "other offences", and that the three traditional categories - crimes against peace, war crimes and crimes against humanity - provided a sufficient basis for the listing of crimes in the draft Code.

3. Of the three crimes covered in part one, complicity was, in his delegation's view, merely one of the forms of participation in a crime, and could not be considered a separate or independent crime. The question of complicity should be dealt with in connection with the general problem of participation, which had yet to be properly addressed in the context of the draft Code. Many of the crimes in the Code could not be committed by a single individual, the most conspicuous examples being, of course, aggression and colonial domination. The question of responsibility for such crimes, to which the existing provisions failed to provide an adequate answer, could be resolved by indicating who could be held responsible, in the case of each crime, by drafting a general provision covering that point, or by a combination of those two solutions. Whatever the solution adopted, complicity should be treated in the context of participation, not as a separate crime. The same was true of attempt, which had no separate existence independent from participation in the attempted crime.

4. The situation was more complex with regard to conspiracy, which was a separate crime in common-law systems. The concept of complot in continental law systems had a far more limited application, and introducing the concept of conspiracy in international law had proved difficult. His delegation doubted whether agreement to commit a criminal act not followed by the commission of the act should have a place in an instrument such as the draft Code, which was intended to punish only very serious crimes. It was inclined to regard conspiracy as a particular form of participation in the crimes defined in the Code, and urged the Commission to study the matter carefully.

5. Turning to the three articles provisionally adopted by the Commission at its forty-second session (A/45/10, para. 158), he said that his delegation agreed with

(Mr. Calero Rodrigues, Brazil)

the inclusion of terrorism and drug trafficking as crimes under the Code, and would therefore confine its comments on articles 16 and X to drafting points. Referring to paragraph (2) of the commentary to article 16, which explained that the title "International terrorism", was intended to distinguish the terrorism in question from internal terrorism which did not endanger international relations, he said that, in the view of his delegation, an act could be defined as a crime under the Code even if it did not endanger international relations. Genocide, for instance, did not necessarily endanger international relations. Crimes against humanity were in themselves of such a repugnant nature and so deeply offended the conscience of mankind that no other justification was needed for their inclusion in the Code. Terrorism might well be included in that category. His delegation was ready to admit that not every manifestation of terrorism should come under the Code, but it did not believe that the consideration of whether an act of terrorism did or did not endanger international relations should be the determining element.

6. In that connection, he remarked that strict compartmentalization between crimes against peace, war crimes and crimes against humanity was, in his delegation's view, useless and even dangerous. The approach meant that the crime, as defined in article 16, could only be committed by agents or representatives of a State; according to the footnote to paragraph 2 of article 16, the question of responsibility of other individuals participating in acts committed by such agents or representatives would be reviewed in the light of the provisions on complicity and on crimes against humanity, to be examined by the Commission at a later stage. His delegation would await that stage before pronouncing itself on the adequacy of a provision which, for the time being, it did not consider satisfactory.

7. While it was satisfied with the drafting of article X, which made felicitous use of language employed in existing instruments, with the addition of the necessary reference to "a large scale", his delegation questioned the wording of paragraph (1) of the commentary to that article, which seemed to imply that only paragraph 3 of the article dealt with psychotropic substances as well as with narcotic drugs. Its understanding was that all three paragraphs of the article dealt with both narcotic drugs and psychotropic substances and that both were covered by the abbreviated expression "narcotic drugs" used in the title and the first two paragraphs. His delegation also disagreed with the statement in paragraph (6) of the commentary that paragraph 2 of the article explained the meaning of the words "facilitating" and "encouraging" in paragraph 1; in fact, paragraph 2 did not explain the meaning of those words, but only indicated a particular situation which would be covered by them.

8. While it had no objections to article 18 from the point of view of drafting, his delegation remained unconvinced that the recruitment, use, financing and training of mercenaries constituted a crime of sufficient gravity to justify inclusion in the Code. If the Code was to be a viable instrument, it should include only infractions of a most serious nature. Accordingly, although it recognized that the activities of mercenaries were to be condemned, his delegation wished to reserve its position on the article.

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9. Turning to the question of an international criminal court, he said that most of the issues raised in the report were of a technical nature and involved a choice between several possible solutions designed to ensure fair and impartial application of criminal law at the international level. In his delegation's opinion, members of the Committee could and should express their views on the different solutions available, the final choice being, however, left to the Commission, which would undoubtedly take full account of the views expressed.

10. With regard to the three options set out in connection with the court's jurisdiction (A/45/10, para. 123), he said that his delegation was entirely opposed to the option set out in subparagraph (ii); if a crime was not considered to merit a trial before the court, it should not be included in the Code. The possibility set out in subparagraph (iii), on the other hand, was well worth considering. It was quite possible, although not desirable, that some international crimes would be left out of the Code; in that case, States which were parties to the instrument defining the crime and also to the statute of the international criminal court might decide that such crimes should also come under the court's jurisdiction. In that connection, he stressed the importance of maintaining a distinction between the material law defining a crime and the procedural law governing its application. An international criminal court, if its creation were decided upon, should be established to try crimes already characterized as such in international law, whether in the Code or in other instruments. While the Code should be the main basis for the court's jurisdiction, the possibility of extending jurisdiction to crimes outside the Code should not be excluded, provided those crimes were clearly defined in other instruments.

11. With regard to the nature of the court's jurisdiction (para. 130), his delegation took the view that options (ii) and (iii) would create so many problems that they did not seem recommendable. If a court were established, it should be given full responsibility for the administration of justice within the scope of its competence.

12. On the question of "submission of cases" (paras. 135 to 137), he stressed the need to distinguish between the bringing of a case to the attention of the court and the actual initiation of proceedings. The expression "submission of cases", which was not, perhaps, altogether well chosen, appeared to refer only to the first of those steps. In any event, the court should be assisted by an organ charged with criminal prosecution, tentatively described by the Commission as the prosecuting attorney's office. It would fall within that organ's attributions, once it had decided that grounds for instituting proceedings were present, actually to bring a case before the court. The question of "submission of cases" in the sense in which it was employed by the Commission was therefore of limited importance; some latitude could be accepted in that regard, provided there were safeguards to prevent frivolous initiatives from overburdening the prosecuting attorney's office.

13. With regard to the Commission's conclusions (paras. 155 to 157), he said that one of the reasons why his delegation had not, in the past, favoured the establishment of an international criminal court was that it doubted whether such a court would have enough support from States to be a meaningful institution;

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indeed, his delegation's scepticism concerning the whole exercise of codifying crimes against the peace and security of mankind stemmed from similar considerations. That position was not, however, immutable. His delegation was attentive to developments taking place in international relations and international law. If the international community was able to reach broad agreement, first, on a reasonable Code defining a limited number of very serious crimes and establishing the penalties to be applied and, second, on a well-structured international criminal court offering guarantees of independence and impartiality, and capable of ensuring adequate application of the Code, his Government might be prepared to join the consensus. While remaining unwilling to express optimism at the present stage, his delegation did not take an entirely negative view. The General Assembly should request the International Law Commission to continue in earnest with its work on the draft Code and on the elaboration of a draft statute for an international criminal court, so that the right decision might be adopted at the appropriate moment.

14. Mr. YAMADA (Japan), commended the Special Rapporteur on the draft Code of Crimes for his efforts in submitting the eighth report on the topic. In particular, Japan appreciated the fact that, in defining the concept of "related offences", the Special Rapporteur had taken due account of the general principles and types of crimes embodied in the criminal codes of various countries.

15. In addressing the topic, his delegation wished to reaffirm its basic conviction that unless the international community was ready to accept a mechanism established to ensure the effective implementation of the Code, such as an international criminal court whose jurisdiction would be acceptable to States, it was not advisable for the Commission to engage in drafting an international code for the punishment of perpetrators of acts which constituted crimes against the community as a whole. Assuming the Commission had to continue working on the topic, it should proceed with the greatest caution, bearing in mind the need to formulate rules that would be truly meaningful in a world which had undergone tremendous changes since the immediate post-war era, when it had first embarked upon the consideration of the topic. On many important issues, such as the question of what constituted a crime against the peace and security of mankind, that of the establishment of an international criminal court or that of the specific types of punishment to be imposed, the Commission's members were still divided.

16. With regard to the three articles provisionally adopted by the Commission at its forty-second session, he did not think that the offences of complicity, conspiracy and attempt should be treated independently from other crimes covered by the draft Code. Furthermore, the concept of conspiracy had not become a part of general theory in all national criminal codes, and his delegation therefore doubted the wisdom of introducing that concept in international criminal law.

17. The Commission's debate on the question of the possible establishment of an international criminal jurisdiction had once again demonstrated the serious and complex nature of the problems involved. His delegation therefore hoped that the

(Mr. Yamada, Japan)

Commission would proceed with the utmost prudence and adhere to the solid juridical approach which that delicate subject required.

18. Turning to chapter VI of the report (A/45/10) (Relations between States and international organizations (second part of the topic)), he said that his Government recognized the topic's general significance and its potential to contribute towards strengthening the legal basis of international organizations. At the same time, the relationship of the topic to existing agreements governing the privileges and immunities, legal personality or status of international organizations of a universal character had to be carefully considered. It was to be hoped that the Commission would conduct its deliberations with great care, with a view to drafting a useful convention which could supplement the relevant existing international agreements. If the Commission's objective was to produce a set of new unified rules applicable to all international organizations, such rules would inevitably provide minimum standards only, and would be much narrower than those established under existing conventions. He wondered whether such a goal was truly desirable from the point of view of strengthening the international organizations' legal basis.

19. Mr. THIAM (Guinea) welcomed the progress made on the draft Code of Crimes against the Peace and Security of Mankind. With regard to complicity, while his delegation agreed, with some reservations, that the Commission should not be too ambitious, since complicity and other notions could not be defined with all the desired precision, at least at the international level, it felt that the Special Rapporteur's new version of draft article 15 (A/45/10, footnote 27) contained the appropriate guidelines to enable the judge to determine the responsibility of each of the accused and thus to distinguish perpetrators from co-perpetrators and accomplices. It was relevant, in that connection, to draw attention to the difference between co-perpetrators and accomplices. While the earlier version of draft article 15, paragraph 2, had taken into account accessory acts prior to or concomitant to the principal offence and subsequent accessory acts (ibid., footnote 26), it had not been sufficiently broad to cover all types of complicity. His delegation endorsed the Special Rapporteur's view on the link between the act and the perpetrator, and on the fact that complicity comprised material, intellectual as well as abstract acts; it therefore endorsed the new version of draft article 15, which was suitably precise.

20. His delegation was not, however, satisfied with draft article 16, which failed to include co-operation in a common plan as a form of complicity. The co-perpetrator was more culpable than the accomplice, in his delegation's view, for he acted in concert with the perpetrator of the act. A text along the following lines would be preferable: "The act of preparing a common plan to commit any of the crimes defined in this Code or participation therein constitutes conspiracy". Material and intellectual acts would be included.

21. With respect to attempt, the new version of draft article 17 was more balanced than the initial version, and more clearly highlighted the elements of harmful intent and gravity which distinguished between punishable attempt and

(Mr. Thiam, Guinea)

non-punishable intent. It thus left sufficient latitude to the judge in each case. His delegation agreed that international traffic in narcotic drugs should be treated as a crime, and accepted draft articles X and Y. His delegation also endorsed the establishment of an international criminal jurisdiction, which it considered essential in order to enforce the provisions of the draft Code of Crimes against the Peace and Security of Mankind. Peace, security and indeed the very existence of mankind were imperilled by international organized crime, and only intensified international co-operation to combat it would prove effective.

22. The curtailment of national sovereignty which prompted some States to express concern would be tempered, if not diminished, by the acceptance by each State of the competence of an international criminal jurisdiction. His delegation did not view the problems relating to the establishment of the proposed jurisdiction to be insurmountable. Among the various options proposed by the Commission, his delegation preferred the establishment of a court independently of the Code, to exercise exclusive jurisdiction over all crimes against the peace and security of mankind. The court's competence and jurisdiction over persons should apply only to individuals and, possibly, to legal entities other than States. As to the submission of cases, his delegation preferred the third option proposed by the Special Rapporteur. The establishment of the court by an amendment to the Charter of the United Nations would make it a United Nations organ and thus automatically resolve the question of its financing.

23. The double-hearing principle as a guarantee of the individual's right to a fair and impartial trial prompted his delegation to favour an arrangement whereby all cases could be tried in chambers of the court, and appeals could be heard by the plenary court. Such an arrangement would also allow accused persons some choice as to who would be their judges. Where there was concurrent jurisdiction, national tribunals should not be able to re-examine decisions of the international court. However, it should be possible for the international court to re-examine a decision of a national court, provided that the principle of non bis in idem prevailed.

24. Ms. THORPE (Trinidad and Tobago) observed that mounting global concern over increasing international crimes such as terrorism and the illicit trafficking in narcotic drugs underscored the urgency of efforts to establish an international criminal court. Her delegation deeply appreciated the progress made by the Commission on the subject. The work towards the establishment of such a jurisdiction and on the codification of international criminal law was a positive step towards a functioning international order which would enhance the activities planned for the United Nations Decade of International Law.

25. Her delegation would not promote any mechanism that would diminish the effectiveness of existing national and multilateral mechanisms for prosecuting international crimes, lead to a conflict of jurisdiction between the States concerned or compromise the sovereignty of any State. It viewed the proposed jurisdiction as part of a system of international security which all States, particularly small ones, urgently needed. The court should exercise jurisdiction

(Ms. Thorpe, Trinidad and Tobago)

over international crimes in respect of which States would confer competence. Given the necessity of reconciling the pressing need for an international criminal jurisdiction with the view of many States that the completion of the draft Code was a prerequisite to the establishment of such a court, the Commission should draw up an initial, restricted list of crimes on which there already was international agreement, and which could be placed promptly under the jurisdiction of an international criminal court. That list could be expanded at a later stage.

26. The Commission should consider extending the jurisdiction of the draft Code to legal entities other than States in the case of crimes such as drug trafficking, in view of the extensive reach of such crimes.

27. As to the three possible models for the proposed court, the proposal to give the court exclusive jurisdiction could prompt serious objections among States which preferred to have the option to institute an action before a domestic court or before the international criminal court. The second model, ensuring concurrent jurisdiction between an international criminal court and national courts, would permit States to decide on a case-by-case basis to which jurisdiction of a particular matter should be submitted, thereby alleviating their fears that their sovereignty might be compromised. With respect to the third model, which envisaged an international court having only a review competence, her delegation believed that the proposed criminal court should be used to provide States with a third alternative to trial by domestic courts and extradition. They would then be in a position to choose whether or not they would confer jurisdiction on the international criminal court. Consideration might also be given to creating a review mechanism within the international criminal court. States should also consider empowering the court to give advisory opinions on international criminal matters submitted to it by domestic courts or organs of the United Nations.

28. On the question of who might submit a case to the court, her delegation had noted in particular the suggestion that while all States parties to the court's statute would be entitled to bring a case before it, there might be instances in which a State which was not a party to the statute might wish to have locus standi before the court because it had an interest in the proceedings.

29. The proposed court should be established by a separate convention which would be open to all States Members of the United Nations. It should be of moderate size, with judges representing the main legal systems and civilizations of the world; they would be elected by the parties to the statute. The court's judgements should be binding on the parties. Her delegation acknowledged that in certain jurisdictions, it would be necessary to adopt constitutional amendments so that judgements of the court would be recognized by national courts. The statute of the court should ensure the rights of the accused, for example, the right to an attorney of his own choosing, and the right to be presumed innocent until proven guilty. An international detention facility would be required, and States should submit their recommendations on that topic. Until that issue was resolved, national facilities could be used.

(Ms. Thorpe, Trinidad and Tobago)

30. On the possibility of establishing other international trial mechanisms, her delegation preferred a single organ for international criminal justice, rather than separate courts for different categories of crimes. The court could be divided into chambers of three judges, as was the case for the International Court of Justice, thereby permitting the speedy adjudication of cases. However, her delegation did not favour amending the Statute of the International Court of Justice in order to entrust it with jurisdiction in criminal matters.

31. While recognizing that far-reaching decisions were needed in respect of the various issues involved in the establishment of the proposed court, she reiterated her delegation's conviction that, given the time and intellectual energy expended over many years on the entire proposal, those questions did not constitute insurmountable barriers.

32. The Commission had been encouraged by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to pursue its consideration of the establishment of the court or a similar mechanism, in a manner that would guarantee both its effective operation and absolute respect for the sovereignty and territorial and political integrity of States, and the self-determination of peoples. Since other bodies in the United Nations system also had been considering the possible establishment of an international criminal jurisdiction, it was essential for the International Law Commission, in its consideration of the question, to co-operate closely with those bodies, particularly the Committee on Crime Prevention and Control and its secretariat.

33. Mr. TREVES (Italy) said that the draft Code of Crimes against the Peace and Security of Mankind did not draw a distinction between two categories of crimes, a distinction which was significant in the context of the proposed international criminal court. The first category involved crimes committed by individuals who were in a position of authority (and who, by those acts, made their Governments break certain rules of international law); they could not claim to be exempt from criminal responsibility, because they were agents or organs of a State. The second category - which might include heinous crimes that should be firmly punished - comprised crimes committed by individuals not in a position of authority, and therefore did not entail State responsibility or the problem of determining whether the crimes were attributable to individuals who otherwise were exempt from criminal responsibility. Thus, the role an individual played in a State in which he exercised a position of authority, and whether a crime could be attributable to him under international law, were significant in the context of the proposed international criminal court.

34. With respect to the second category of crimes, an international criminal court would - depending on the option selected - replace, function concurrently with, or function as a review body over domestic criminal courts competent under domestic law or under international criminal law. In the case of the first category of crimes, the jurisdiction of the international criminal court would be based on an international instrument, and, if the option of the exclusive jurisdiction of the court was not selected, so also would the jurisdiction of the domestic courts in respect of which the international court might perform its duties concurrently or as an appellate body.

(Mr. Treves, Italy)

35. Accordingly, it must be decided, in the case of the second category of crimes, whether the system providing that domestic courts had universal jurisdiction and that alleged perpetrators should either be prosecuted or extradited was satisfactory, or whether it should be replaced by, or supplemented with, an international court. The decision raised the issues of efficiency and the balancing of costs and benefits. While his delegation had strong doubts as to the advisability of creating an international court for all the transnational crimes under consideration, it might be useful in respect of certain types of internationally organized crime, in order to protect States in which the prosecution of the criminal organizations might create problems for the stability of the political system. It might also be useful in cases in which the criminal activity was undertaken by persons in a position of authority, although the activity would not at the same time constitute an internationally wrongful act entailing international responsibility.

36. The quality of the decision to be taken was different in respect of the first category of crimes to which he had referred earlier. The question was whether the very acceptability of the notion of those crimes depended on the existence of an international judge having jurisdiction to pronounce on them. There were strong reasons to affirm that that was the case. It was unlikely that individuals who had committed crimes in the exercise of their functions as organs of a State would be subjected to criminal judgement in the territory of that State, unless revolutionary events had taken place and the Government had undergone a radical change. Prosecution before domestic courts outside the territory of that State might be possible, but political considerations could easily come into play. Such prosecution might be perceived as interference or as a politically hostile act. In other cases, the desire to maintain good political relations could prevent prosecution. Consequently, the existence of an international criminal court would lend credibility to the substantive rules defining the crimes.

37. None the less, his delegation was fully aware of the substantial difficulties to be overcome on all the related issues in order to establish an international criminal court whose jurisdiction would be generally acceptable to all States. It even had the impression that States might be readier to accept the jurisdiction of such a court to prosecute particularly heinous crimes committed by persons not in a position of authority, than to try individuals who had committed crimes while in a position of authority.

38. Concerning the article on complicity, he said that his delegation shared the view expressed by some members of the Commission that it was preferable to abandon the traditional perpetrator/accomplice dichotomy and adopt the broader notion of "participant". That notion, however, had as a consequence that the traditional descriptions of acts of complicity, such as aiding and abetting, became unnecessary, as did the very concept of complicity, since "participation" encompassed all cases in which more than one person was the active subject of the crime. Possible distinctions, connected to the degree of participation, belonged to the area of penalties only. However, the revised article 15 submitted by the Special Rapporteur (A/45/10, footnote 27) mixed the two approaches, as it affirmed

(Mr. Treves, Italy)

that "participation" constituted the crime of complicity, and then listed a series of acts of complicity. The article would have been simpler and clearer had it been faithful to the idea of "participation" as he had just described it.

39. Turning to the provisions on illicit traffic in narcotic drugs, he said that the element which distinguished the crimes connected to drug trafficking considered as crimes against humanity from other such crimes was that they were "on a large scale". He agreed with the general idea that a mass element was necessary, but had the impression that for the purposes of criminal law, the expression "on a large scale" might not be precise enough. He agreed that the crime might be committed not only by common criminals, but also by the agents or representatives of a State. That was one of the cases in which an international criminal court might be useful, even when the crime committed by the person in a position of authority did not necessarily entail international responsibility on the part of the State.

40. He noted that the International Law Commission had provisionally adopted article 18, on the recruitment, use, financing and training of mercenaries. He agreed that the 1989 International Convention on Mercenaries should be followed as much as possible, especially as far as the definition of mercenaries was concerned. However, the Commission could have drawn a further lesson from the experience gained by the General Assembly and its Ad Hoc Committee in negotiating the Convention. The travaux préparatoires on the Convention showed clearly that States did not agree as to whether violations of the obligations set forth in article 5 of the Convention should be considered, or should always be considered, crimes against the peace and security of mankind. In the light of that experience, his delegation had strong doubts as to the political viability of the sweeping statement in article 18, paragraph 1, of the draft Code.

41. Mr. TOMKA (Czechoslovakia) said that while recent international developments had created more favourable conditions than ever before for the establishment of an international criminal court, the difficulties connected with such a project should not be overlooked. He believed that the system of universal jurisdiction should not be abandoned; on the contrary, it should be retained in the draft Code and possibly linked effectively to the establishment of a permanent, rather than an ad hoc, international criminal court. He did not favour the first option outlined in paragraph 123 of document A/45/10, namely, an international criminal court with exclusive competence. That option would entail numerous problems, for example, the need for the establishment of a special international investigating or prosecuting body which would bring a case before the court. In fact, the proposed model raised the question of how to proceed with current treaty obligations concerning the prosecution of crimes of an international nature which were based on the principle aut dedere aut judicare.

42. On the other hand, the third option - the establishment of an international criminal court competent to review the judgements of national courts in cases of crimes under international law - was very interesting. That system would allow for the harmonization of the practice of national courts in cases of crimes against the peace and security of mankind, and would also make possible a mechanism for

(Mr. Tomka, Czechoslovakia)

monitoring compliance by the parties to the Code with their obligation to suppress crimes against the peace and security of mankind, and to prosecute the perpetrators of such crimes. If, in addition, the right of appeal to such an international court was granted to persons charged with the commission of a crime, the procedural guarantees of due process, objectivity and fairness would be strengthened, and problems of compliance with article 14 of the International Covenant on Civil and Political Rights would be precluded. The International Covenant provided for the right to appeal of persons under trial, a provision which could not be implemented if such persons had been tried in the first instance by an international criminal court. He did not find convincing the argument that the problem could be eliminated by the establishment of a first-instance chamber within the framework of an international court, with appeals heard by the plenary court. In fact, plenary sessions could never ensure the full participation of judges, since those who had been present in the chamber at the time of the original judgement would have to be excluded later.

43. The competence of an international criminal court rationae materiae should cover the crimes against the peace and security of mankind listed in the draft Code. The competence rationae personae should be defined in such a manner as to cover only individuals, which logically derived also from article 3, paragraph 1, of the draft Code.

44. The court should be composed of a limited number of judges, elected in the same way as to the International Court of Justice. It could probably be included in the United Nations system, and should be funded from the United Nations budget.

45. He was convinced that the establishment of an international criminal court would enhance the role of international law in combating crimes against the peace and security of mankind. In order for the preparation of a draft statute for an international criminal court not to impede progress on the draft Code, the question of the statute could constitute a separate item on the Commission's agenda.

46. Work on the draft Code had progressed further with the provisional adoption of three new draft articles (A/45/10, chap II, sect. D.2), but it was still far from complete. There remained to be defined not only other individual crimes against mankind, but also a whole group of war crimes. It was necessary to review the general principles, determine the circumstances excluding criminal liability, and examine the issue of attribution of crimes to perpetrators.

47. With regard to draft article 16 on international terrorism, he supported the Commission's decision to confine itself to terrorism organized and carried out by a State against another State. Concerning the use of the terms "agents" and "representatives" in paragraph 1, he said that there was a considerable overlap in their meaning even if they were not equivalent from the point of view of international law. In the commentary to article 16, it might have been appropriate to explain in greater detail the meaning of "tolerating", because otherwise the formulation could be interpreted too broadly in practice.

(Mr. Tomka, Czechoslovakia)

48. The same comments concerning the terms "agents" and "representatives" could be applied to draft article 18 concerning the recruitment, use, financing and training of mercenaries. With regard to illicit trafficking in narcotic drugs, he fully agreed that it should be classified as a crime against humanity. He had doubts, however, as to whether it could also be regarded as a crime against peace. The definition in draft article X entailed the problem of defining possible perpetrators. If any individual could be a perpetrator, there was no apparent need to single out agents or representatives of a State. He had previously assumed that the draft Code would apply only to crimes committed by individuals who were in positions of authority. Crimes other than those under international law, however serious they might be, should be prosecuted in some other way.

49. With regard to the draft articles on complicity, conspiracy and attempt, he shared the view that those crimes were not special offences per se and therefore should be included in the part of the draft Code dealing with general principles.

50. Mr. BELLOUKI (Morocco), referring to chapter II of document A/45/10, said that complicity, conspiracy and attempt should continue to be treated as autonomous offences in the future draft Code. The articles dealing with those concepts should apply to all the crimes listed in the instrument.

51. With regard to draft article 15 on complicity, he was of the view that the definition of complicity should extend to acts committed prior to, concomitantly with or after the principal crime. He also believed that those who aided or abetted the perpetrator or perpetrators of a criminal act by means of counsel or advice which led to or facilitated the commission of a crime should be treated as accomplices. In the case of a mass offence, the concept of complicity should not be extended unduly to those who were not responsible for intellectual or physical acts which had led to the commission of the principal crime. The judge's role remained decisive in that regard. The definition of the principal perpetrator was unnecessary. With regard to the distinction between subsequent acts and complicity, he was of the view that those who, without having participated directly in the commission of a crime, aided the direct perpetrator to evade criminal prosecution while knowing of his criminal conduct should be treated as accomplices.

52. Concerning the formulation of a general provision on criminal participation, as suggested by some members of the Commission, there was a danger of giving the judge an excessive role in the assessment in each specific case without supplying him with the requisite information. Furthermore, the concepts of perpetrator and accomplice had long been embodied in criminal law. Naturally, an accomplice to a crime provided for in the Code would be liable to the respective penalty.

53. He proposed that the new version of draft article 15 submitted by the Special Rapporteur should be amended to read:

(Mr. Bellouki, Morocco)

"Article 15. Complicity

"Taking part, without direct participation, in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.

The following are acts of complicity, whether by action or by omission:

(a) Inspiring the commission of such a crime by, inter alia, promises, threats, abuses of authority or power, instructions, incitement, urging, instigation or abstention, when in a position to prevent it;

(b) Gifts, aid, assistance or provision of means to the direct perpetrator which facilitated the act, knowing that they would be used for that purpose;

(c) Aiding the direct perpetrator, while knowing of his criminal conduct, to evade criminal prosecution, either by giving him refuge or by helping him to eliminate the evidence of the criminal act."

54. The amendments which he had proposed underscored the following points: the accomplice was not a perpetrator - hence the phrase "without direct participation"; the crime of complicity could be committed by action or by omission; intellectual acts should logically precede physical acts - hence the transposition of subparagraphs (a) and (b); included among intellectual acts were abuses of authority or power, so as to take into account a superior officer's consent to a crime or to instructions which might be direct orders to commit a crime; included among physical acts were gifts, which might be of a pecuniary nature, as well as the concept of an act committed with full knowledge of the facts; the phrase "after the commission of a crime" should be deleted, while the scope of subparagraph (c) should be extended by including the concept of knowledge of the criminal conduct of the direct perpetrator of the crime.

55. With regard to draft article 16 on conspiracy, he said that complicity and conspiracy were two separate concepts. Conspiracy was punishable where two or more persons participated in a common and established plan to perpetrate a crime even if no crime was committed. Assessment of the degree of culpability should be influenced by the knowledge that there could be cases in which a proposal to form a conspiracy was made and not agreed to and in which a conspiracy was followed by an act begun or completed in preparation for the commission of a crime.

56. In view of the mass nature of some international crimes, such as genocide, they could not be committed by individuals acting alone; hence the collective nature of the responsibility incurred, a legal concept which should be handled carefully, taking into account the nature of the crime. He proposed that the first sentence of the new version of draft article 16 submitted by the Special Rapporteur (A/45/10, footnote 29) should be amended to read "a common and established plan".

(Mr. Bellouki, Morocco)

57. Turning to draft article 17, he said that attempt should be handled carefully in the future Code. The definition provided by the Special Rapporteur was basically acceptable. He proposed that the second paragraph of the new version of article 17 submitted by the Special Rapporteur should be amended to read: "Attempt means any commencement of execution of a crime against the peace and security of mankind or the commission of unequivocal acts leading directly to its execution that failed or were halted only because of circumstances independent of the perpetrator's intention". As pointed out by the Special Rapporteur, the seriousness of the attempt should be a factor in determining whether or not it was punishable, and it should be left to the judge to decide on a case-by-case basis.

58. With regard to draft articles X and Y on illicit traffic in narcotic drugs as a crime against peace and as a crime against humanity, his delegation agreed in principle with the new versions submitted by the Special Rapporteur, but would have preferred a sharper distinction between the two crimes. As a crime against peace, traffic in narcotic drugs endangered political stability, while as a crime against humanity, it endangered the health and well-being of the world's peoples.

59. Turning to the draft article concerning breach of a treaty designed to ensure international peace and security, he said that the subject deserved careful consideration. In the first place, it was necessary to identify the treaties in question and to define the real consequences for international peace and security of their breach. It was to be hoped that pacta sunt servanda would remain the cardinal principle of treaty law; if observed, it would render nugatory the draft article.

60. The idea of establishing an international criminal jurisdiction was not a new one. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid had been implemented by States through their national courts even though each Convention had provided for the establishment of an international court. Accordingly, in his view, the system of universal jurisdiction had functioned well. On the other hand, given the existence of more serious crimes which were taking on such wide dimensions that they endangered the very existence of States and peaceful international relations, an international criminal jurisdiction might perhaps provide a valuable recourse for small States in the future. In that connection, it might be logical to combine the establishment of an international criminal jurisdiction with the completion of the draft Code.

61. He welcomed the provisional adoption by the Commission of three new draft articles. With regard to draft article 16 on international terrorism, it should be borne in mind that terrorism in all its forms was an act which endangered international peace and security. Draft article 18 on mercenaries was justified by the adoption of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which his country had signed. Lastly, with regard to draft article X on illicit traffic in narcotic drugs, it should not be forgotten that such traffic endangered the stability of small countries, especially when drug traffickers formed ties with terrorists and mercenaries.

62. Mr. AKAY (Turkey) said that terrorism, the recruitment, use, financing and training of mercenaries, and illicit traffic in narcotic drugs were activities that posed grave threats to the peace and security of mankind. Failure to punish the perpetrators of such crimes adequately would constitute a threat to all mankind.

63. There were too many instances where such acts, even after being recognized as crimes, were allowed to go unpunished, often for political reasons. It was therefore of primary importance that all countries should revise their national legislation with a view to providing for appropriate coverage of the offences in question, and that they should impose severer penalties. Such an approach would lay an appropriate foundation for future international co-operation. However, since the preparation of the statute of an international criminal jurisdiction was a very complex issue it was too early to extend the Commission's mandate to cover such a task.

64. In the preparation of any new code, the underlying principle should be its applicability. Articles that might be inapplicable would have a negative impact on the applicability of the instrument as a whole. Moreover, every effort must be made to keep politics and law separate throughout the preparation of a code. Lawmakers had the tricky task of preparing codes that would have a high degree of applicability without regard to the elements of time and location.

65. The subject-matter dealt with in the draft Code of Crimes against the Peace and Security of Mankind was controversial and political, and its codification therefore gave rise to serious difficulties. There appeared to be no specific reason why the issue should be dissociated from the Commission's report and considered under a separate item. Turkey believed that it should be dealt with as an integral part of the Commission's report, and that it should be considered together with many other very important issues under the same item.

66. Mr. AL-BAHARNA (Bahrain) said that his delegation supported the establishment of an international criminal court under the draft Code. The question had arisen whether the function of trying criminals under the Code might not be entrusted to the International Court of Justice. That would require amendments to the Statute of the Court, and would also require an altogether different type of infrastructure, machinery and atmosphere than what was obtained under that Statute. The exercise of criminal jurisdiction on the international plane would require a mechanism for prosecution, a body of judges well experienced in the administration of criminal justice and, above all, an environment that was appropriate to criminal trials. In the opinion of his delegation, there was no such international mechanism at present.

67. His delegation considered that the proposed court's jurisdiction should extend to all crimes in respect of which States would confer competence upon it, particularly under existing international conventions. That would not only free the court from the delay in the adoption of the Code, but would also base jurisdiction of the court on the consent of States. Closely related to the issue of jurisdiction was the intricate question of the relationship between national courts and the proposed international court. It would be necessary to establish

(Mr. Al-Baharna, Bahrain)

under what conditions the international court would exercise its jurisdiction, and what that relationship would be. The ideal approach would be to institute a procedure that combined the best features of the options referred to in paragraph 130 of the Commission's report (A/45/10). He suggested that pending the entry into force of the draft Code, the international criminal court could be given exclusive jurisdiction in respect of international drug trafficking and other crimes of a serious nature, and also invested with review competence in respect of other international crimes.

68. Concerning the question of who might submit a case to the court, he said that it was difficult for his delegation to express preference for any one of the options mentioned in paragraph 135 of the report. The Commission should further examine the issue and present a model that would be suited to an international criminal jurisdiction. However, his delegation would support a "liberal" approach, such as the one suggested in paragraph 137 of the report.

69. His delegation would like the proposed court to be established under the aegis of the United Nations, with a strong link to the Organization. Both considerations of policy and of law commended such an approach. As to whether it should be set up under a convention or resolution of the General Assembly, his delegation had no special preference. It would not be necessary to amend the Charter of the United Nations for that purpose.

70. The establishment of an international criminal jurisdiction necessarily involved the setting up of a prosecuting machinery. In that regard, neither the common-law nor the civil-law model appeared to be suitable. His delegation would suggest that a system should be adopted that would work under the existing circumstances, ensuring the independence of the court from States and investing it with an international character. The Commission would have to devise the right formula for such a system.

71. On the question of the legal force of judgements, discussed in paragraph 145 of the Commission's report, his delegation's view was that in cases where the international criminal court had exclusive jurisdiction, the national court would be bound by the decisions of the former; in cases where the international court was invested with review powers, the decisions of the national court could be re-examined and modified by the international court, but not vice versa.

72. The implementation of judgements was another difficult question. His delegation would support the second option mentioned in paragraph 150 of the report, namely, that of utilizing the machinery of national systems. So long as international law depended upon national institutions for its enforcement, an international criminal court also had to depend upon national systems for implementing its judgements.

73. The court should be financed by the United Nations so as to ensure continuity in financing.

74. Mr. SCHARIOTH (Germany) said that the Commission had been a successful institution from its very inception. But yesterday's success was no guarantee of tomorrow's influence. In fact, the Commission had reached a crucial juncture in its history. The world around it had changed, and the world community had new needs and concerns. The Commission would have to adapt to those needs and concerns, or it would lose its influence on rapidly evolving international relations.

75. The time of grand codification schemes might well be over. What would be needed in the future was work at what could be called the frontiers of law. Obviously, that would demand conscious policy decisions, in addition to pure legal expertise. It was the responsibility of Governments to address and settle basic policy issues, and the forum in which Governments should give guidance to the Commission was the Sixth Committee. In the new fields of international law in which the Committee was called upon to act, an approach basically consisting of four major steps could be envisaged.

76. Initially, the Committee would select a problem that was ripe for consideration by the Commission, which meant that: the issue must be a matter of genuine concern to the international community; there must be a practical need for universal legal solutions, in contrast to regional solutions; and there must be a reasonable prospect that a generally acceptable result could be achieved. Then, the Commission would study the problem and identify the main issues, as well as basic policy options. At the next stage, Governments would discuss those options in the Sixth Committee and, following negotiations, give the Commission guidance as to the direction its further work on the topic should take. Only if those basic policy decisions were generally accepted in the Committee could the final outcome of the Commission's work be expected to meet with wide approval and thus effectively shape international law. Lastly, the Commission would draft concrete legal texts in keeping with the Committee's policy decisions. Those texts would not necessarily be conventions; often, in the light of the preceding debate in the Committee, the wisest approach might be the preparation of guidelines or model laws.

77. A second development that would increasingly affect the Commission's working methods was the virtual disappearance of problems that could be solved by succinct analysis and clear legal logic alone. The Commission had originally been set up precisely for that kind of work, and its members continued to be best prepared for such tasks. But the topics on which attention would be focused in the future required, in addition, a great deal of economic, technical or scientific knowledge, and in those areas Commission members must rely on outside expertise. One possible solution would consist in no longer referring all subjects demanding such interdisciplinary expertise to the Commission, but referring them to other forums. That would mean that the Commission would lose its pivotal position in the progressive development of international law, and would no longer be fully utilized for the benefit of the world community. Another approach would be to have the Commission consider interdisciplinary subjects jointly or in close co-operation with bodies of technical experts in the fields concerned. Another very promising way out of the difficulty confronting the Commission might be for it to conduct hearings to tap the expertise of scientific institutions and individual experts.

(Mr. Scharioth, Germany)

78. At the national level, the growing complexity and interrelatedness of contemporary legal issues had led many parliaments, courts and commissions to make increasing use of such a procedure. In certain fields, the Commission would likewise benefit considerably from hearing technical and scientific experts. Article 16 (e) of the Commission's statute already provided for the possibility of consultations with experts. Moreover, the Commission had always held that it was free to adopt special methods for special tasks.

79. A third new trend pointed towards rather limited and specific requests for legal opinions on issues of immediate concern to the international community. In such cases, the value of the Commission's work was directly linked to the time factor. The Commission's current report contained a very good example of the speedy and excellent discharge of such a task. In resolution 44/39 the General Assembly had asked the Commission to examine the question of the establishment of an international criminal jurisdiction. Now, less than a year later, the Commission's comprehensive and clear response was before the Committee (A/45/10, paras. 116-157). It was a very useful survey of all aspects of the establishment of an international criminal court. As to substance, the codification of international crimes was acceptable to his delegation only if the prosecution of such crimes was left to an international criminal court. The Commission should discuss the question of the establishment of an independent, international criminal court, as the procedural basis for the prosecution of crimes against the community of nations. Satisfactory procedural provisions were a prerequisite for the acceptance of substantive criminal-law provisions. Germany was therefore especially grateful for the Commission's analysis, which pointed out the advantages of the establishment of an international criminal jurisdiction, without concealing the considerable number of problems connected with it, even if the court had only review competence. Germany agreed with the Commission's conclusion that establishing such a court would be successful only if widely supported by the international community.

80. The increasing complexity of the issues before the Commission and the growing need for speed raised the question of whether the existing system of having just one Special Rapporteur for each topic was still adequate. When highly complicated issues needed to be considered, it might be advisable to entrust more than one person with the topic. In a number of cases, the Commission had actually made use of small working groups on particular subjects. Article 16 (d) of the Commission's statute provided for the possibility of appointing other members of the Commission to work with the Rapporteur on the preparation of drafts. It might be worth considering the possibility of appointing two co-Rapporteurs in addition to the Special Rapporteur.

81. The Commission was to be commended for some useful innovations in its working methods. For one thing, with increasing frequency it was adopting the practice of seeking guidance from the Committee on specific issues. Another useful innovation that had become accepted practice was staggering the consideration of subjects. Germany welcomed the Commission's decision to focus during the first two weeks of its next session exclusively on work in the Drafting Committee.

(Mr. Scharioth, Germany)

82. It might be appropriate at the current stage to start considering what further topics should be placed on the Commission's agenda. The Commission itself had established a working group that had issued an illuminating report on the long-term programme of work (A/45/10, footnote 325). His delegation agreed with the general criteria for the selection of new topics as listed in paragraph 2 of the Working Group's report. As to specific topics for inclusion in the Commission's programme of work, it might be worth while for the Commission to study questions of treaty law not covered by the Vienna Convention on the Law of Treaties, such as the consequences of objections to inadmissible reservations. Another area of interest might be the protection of investments. In Germany's view, the time was ripe to begin work on the legal principles regulating such protection, possibly in the form of a model law. There were many forums dealing with legal principles regulating aspects of protection of the environment, which was an enormously important but also immensely complex subject that could not be dealt with by lawyers alone. The Commission would certainly not be the only body studying the matter, but the Committee should reflect on the role the Commission could play in that larger undertaking.

83. There were also new opportunities for the Commission. The sterile confrontation between East and West had come to an end, which would release energies for the benefit of all. The opportunities for a new beginning in the dialogue between North and South had never been better. There was a growing awareness that respect for and acceptance of international law lay at the very heart of any international order, as demonstrated also by the overwhelming support for the Decade of International Law. All that opened the way for a less ideological and more problem-oriented approach to the progresive development of international law. Germany believed that the Commission would benefit from such new opportunities and be able to adapt to the international community's new needs and concerns.

84. Mr. HUNJA (Kenya) said that his delegation agreed with the United Kingdom that the Sixth Committee might not be the best forum in which to undertake a detailed discussion of each and every provision of the draft Code discussed by the Commission. Its comments would therefore be quite general.

85. On the issue of methodology, Kenya fully endorsed the Special Rapporteur's view that the Drafting Committee could select the most appropriate method of dealing with the concepts of complicity, conspiracy and attempt in the draft Code (A/45/10, para. 38). It also endorsed in general the approach taken in articles 15, 16 and 17 as redrafted by the Special Rapporteur.

86. Kenya agreed with those members of the Commission who endorsed the view that international illicit traffic in narcotic drugs should be recognized as a crime (para. 79). A twofold characterization of illicit traffic in narcotic drugs as a crime against peace and as a crime against humanity was fully justified. Furthermore, Kenya supported the view that emphasis should be placed on international co-operation in dealing with illicit traffic in drugs, rather than on self-help resorted to unilaterally by certain States.

(Mr. Hunja, Kenya)

87. Kenya was very encouraged by the concrete proposals made by the Special Rapporteur with regard to an international criminal court. The competence of such a court should be limited to the most serious crimes affecting international peace and security. At the current stage in the development of international law, States might not be prepared to go any further than that in derogation of their sovereignty, even in the contemporary favourable international climate. Kenya was therefore in favour of alternative A as proposed. As to the procedure for appointing judges, Kenya was in favour of version A as proposed by the Special Rapporteur, since it would guarantee the court's impartiality. As to which cases could be brought before the court, Kenya believed that there should be as few limitations as possible. It would even go so far as to say that any State Member of the United Nations could bring a case before the court. Of the three possible models referred to in paragraph 155 of the Commission's report, Kenya had a preference for the third model.

88. His delegation wished to commend the Commission for its thorough treatment of the issue of the establishment of an international criminal court. It endorsed the Commission's view, stated in paragraph 121 of its report, that the Court's independence and integrity could be guaranteed by devising a structure with adequate safeguards.

AGENDA ITEM 144: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/45/L.3)

89. The CHAIRMAN announced that Oman had joined the sponsors of draft resolution A/C.6/45/L.3.

The meeting rose at 1 p.m.

UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
34th meeting
held on
Thursday, 8 November 1990
at 10 a.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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Distr. GENERAL
A/C.6/45/SR.34
15 November 1990

ORIGINAL: ENGLISH

90-56979 3024S (E)

The meeting was called to order at 10 a.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/437)

1. Ms. GAO Yanping (China), referring to chapter II of document A/45/10, said that the Commission should give priority to accelerating its work on the draft Code of Crimes against the Peace and Security of Mankind.

2. The concepts of complicity, conspiracy and attempt originated in domestic criminal law and often had different meanings under different legal systems, or even within the same system. For instance, in some countries, conspiracy was always linked to crimes against the State, such as treason, while in other countries that was not the case. If the concepts were to be transposed to international criminal law, they must be given a new content, so as to meet the requirements of such law and become universally acceptable. Given the nature of the crimes in question, many countries, including China, placed complicity and attempt in the part of their criminal codes dealing with general principles, and that approach might be advisable in the case of the draft Code.

3. The new version of draft article 15, on complicity, submitted by the Special Rapporteur was generally acceptable. First, however, it was necessary to define the concepts "principal" and "accomplice", as that would be of practical significance to the court in determining penalties. Of course, given the specific nature of the draft Code, it would be difficult under certain circumstances to differentiate a principal from an accomplice. That did not mean, however, that such a distinction was not needed. Secondly, while physical and non-physical complicity had been dealt with adequately in subparagraphs (a) and (b) of the second paragraph, the wording could still be improved. Thirdly, the concept of complicity after the commission of a crime as set out in subparagraph (c) was controversial. In her view, an agreement prior to the commission of the offence was the key element of complicity after the offence. An act which did not help the principal to perpetrate an offence did not constitute complicity after the offence, but rather a separate crime.

4. She agreed with the Special Rapporteur that conspiracy should be the subject of a separate article. As pointed out in paragraph 57 of document A/45/10, one element of conspiracy was an agreement between two or more individuals to plan and commit a crime. Another element was the physical acts performed to carry out the crime planned. In the light of those two elements, the new version of draft article 16 submitted by the Special Rapporteur was generally acceptable.

5. She also favoured the new version of draft article 17, on attempt, submitted by the Special Rapporteur. The article should refer to that concept in general terms and leave it to the discretion of the court to determine its applicability on a case-by-case basis.

(Ms. Gao Yanping, China)

6. As to whether breach of a treaty designed to ensure international peace and security should be included in the draft Code as a crime against peace, she inclined towards a negative view. In the first place, its inclusion would violate the principle of universality of international criminal law. At its previous two sessions, the Commission had unsuccessfully endeavoured to provide for a balance of obligations governing relations among parties to a treaty and between those parties and a third party. Secondly, the treaty obligations mentioned in the report concerned very complicated and sensitive issues, such as disarmament and arms control. To include such provisions in the draft Code prematurely would have a negative impact on the efforts undertaken by the international community. The article could also affect the universal acceptance of the draft Code. She therefore supported the Special Rapporteur's proposal that it should be withdrawn.

7. Turning to the draft articles provisionally adopted by the Commission (A/45/10, chap. II, sect. D), she noted that draft article 16 characterized international terrorism as a crime against peace. If the article could provide a precise and practical definition of internationcal terrorism as a crime against peace, it would not only be of practical significance in deterring acts of international terrorism, but would also contribute to the progressive development of international law. The article properly limited the concept to terrorism carried out by a State against another State. As explained in paragraph (2) of the commentary, internal terrorism came under internal law and did not endanger international relations.

8. While agreeing with the general thrust of draft article 18, on the recruitment, use, financing and training of mercenaries, she felt that paragraph 1 was too limiting. A State might not directly involve itself in such activities, but might resort to encouraging or tolerating their promotion by private organizations. The encouraging or tolerating of mercenary activities also constituted a crime against peace. In that connection, it was necessary to bring the draft Code into line with the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

9. The growing seriousness of the drugs problem had aroused the concern of the international community. She welcomed the fact that the draft Code characterized illicit drug trafficking as an international crime and a crime against humanity. However, some members of the Commission were of the view that illicit drug trafficking should also be characterized as a crime against peace, and she hoped that their views would be taken into consideration.

10. As to the establishment of an international criminal jurisdiction, the fact that the question had been raised but not acted upon on several occasions showed that it was both significant and complex. In the contemporary world, some international crimes had become so rampant as to endanger the security of some countries. In 1989, Trinidad and Tobago had proposed that an international criminal court should be established in order to try international drug traffickers. It was to be hoped that a degree of consensus could be reached during the current discussions.

(Ms. Gao Yanping, China)

11. At the same time, the question entailed political, legal and practical difficulties. For instance, there was the question as to the crimes over which an international criminal court should exercise jurisdiction. While it was realistic to limit application to individuals without involving States for the time being, the question of what kind of rules should be formulated with regard to legal persons remained to be decided, for the debates on the draft Code had shown that a legal person could be a perpetrator. Furthermore, whatever the form in which an international criminal court exercised its jurisdiction, difficult questions would arise, such as the question of co-ordination between national and international jurisdictions, and the question of the international obligations undertaken by the State under a system of universal jurisdiction, as well as the complex issues of pre-trial examination, prosecution and the international enforcement of judgements.

12. Mr. NGUYEN TRUONG GIANG (Viet Nam), referring to draft articles 15, 16 and 17, as set out in the Special Rapporteur's eighth report on the draft Code of Crimes against the Peace and Security of Mankind (A/CN.4/430), said his delegation agreed that complicity, conspiracy and attempt should be dealt with as separate offences. The relevant provisions should be placed in the part of the draft Code dealing with general principles. The definitions of complicity, conspiracy and attempt included in the new versions of the draft articles submitted by the Special Rapporteur needed to be drafted in a more precise manner.

13. The draft Code covered the most serious crimes against the peace and security of mankind, crimes that could not be committed by an isolated individual or a group of isolated individuals. The offences in question were organized crimes, and those who directed, planned and organized them played a decisive role in making their commission possible. Accomplices and conspirators also played an important role in the commission of such crimes and in helping perpetrators escape punishment. Complicity and conspiracy should therefore be treated as crimes against the peace and security of mankind. However, the draft Code should give the competent courts the power to decide on the gravity of the crimes committed by perpetrators, accomplices and conspirators on a case-by-case basis.

14. Viet Nam was in favour of including illicit traffic in narcotic drugs in the draft Code as a crime against the peace and security of mankind. Since illicit drug trafficking was taking place on a global scale, all countries should participate in global co-operation to deal with that offence. However, inclusion of that offence in the draft Code was but one of a comprehensive series of measures that needed to be taken in order to prevent illicit traffic in narcotic drugs. In order to eliminate that dangerous practice, the international community should reinforce the existing relevant international mechanisms so as to control production of and illicit trafficking in drugs in accordance with the conventions on narcotic drugs adopted so far. Viet Nam supported the Special Rapporteur's approach in dealing with illicit drug trafficking, whereby article X treated it as a crime against peace and article Y treated it as a crime against humanity. In fact, illicit drug trafficking should be considered a crime against both peace and humanity.

(Mr. Nguyen Truong Giang, Viet Nam)

15. Viet Nam welcomed the three additional draft articles provisionally adopted by the Commission. However, one of the most serious crimes, genocide, was still not included, even though it had previously been described by the Special Rapporteur as the prototype of a crime against humanity, and remained a matter of great concern to the international community.

16. As to the establishment of an international criminal jurisdiction, Viet Nam, while welcoming the various options put forward by the Commission, believed that it would be premature to elaborate the statute of a court before the draft Code had been completed. Further in-depth consideration of the matter should be encouraged.

17. Mr. ALZATE (Colombia) said that attempt and conspiracy, which were crimes against the peace and security of mankind, must be given due attention by the international community. The various acts in question must be given objective consideration with a view to producing a code that would be sufficiently broad in scope. The concept of attempt covered commencement of execution of a crime that had failed or had been halted only because of circumstances independent of the perpetrator's intention; but it must also be clearly linked to the objective pursued. A similar assertion could be made in respect of conspiracy. There was even greater justification for such an interpretation if account was taken of such factors as the possible political significance of the involvement of a State's nationals in criminal action outside its territory.

18. Colombia particularly welcomed the submission by the Special Rapporteur of the draft articles on illicit traffic in narcotic drugs, both as a crime against peace and as a crime against humanity. Colombia endorsed the statement in paragraph 77 of the Commission's report (A/45/10) that such trafficking could affect international peace by giving rise to a series of conflicts, for example, between the producer or dispatcher State, the transit State and the destination State. The destination State was the State where narcotic drugs and psychotropic substances were delivered, distributed, sold and consumed. Obviously, great care must be taken to de-politicize any action to be taken in respect of individuals or legal persons, whether or not they were agents or representatives of a State. In principle, Colombia agreed that private groups or public officials could be perpetrators or accomplices in respect of illicit traffic in narcotic drugs, and thus be a threat to international peace.

19. As Colombia knew only too well, a State's stability could be undermined as a result of acts committed by individuals engaged in narco-terrorism. Moreover, failure by some States to co-operate in dealing with such acts in their territory as the transit and distribution of narcotic drugs and psychotropic substances, and money-laundering could lead to social and economic breakdown in those States, which would inevitably have an impact on their relations with the other members of the international community.

20. Paragraph 85 of the Commission's report referred to the importance of international co-operation with a view to eliminating illicit traffic in narcotic drugs. While Colombia fully endorsed that opinion, it also recognized that without a true commitment on the part of all States, it would not be possible to control

(Mr. Alzate, Colombia)

narco-terrorism. The problem of illicit traffic in narcotic drugs would never be solved until effective measures were taken to eliminate or at least reduce drug consumption.

21. Direct perpetrators and individuals who provided advice and training in connection with the activities in question, who directed or tolerated such activities, who engaged in trafficking, or who consumed narcotic drugs and psychotropic substances should all share equal criminal responsibility under a code of crimes against the peace and security of mankind. Narco-terrorism was financed solely from the proceeds of sales to consumers. The relationship between traffickers, terrorists and consumers must therefore be taken into account when the degree of responsibility was determined and when the relevant rules were prepared.

22. Widespread consumption of narcotic drugs and psychotropic substances was a serious threat to the health of all mankind. Similarly, the crimes associated with drug addiction and with the social environment in which drugs were consumed were also a serious threat to all mankind. Illicit traffic in narcotic drugs and psychotropic substances could thus unquestionably be regarded as a crime against the security of mankind, and should therefore be included as such in the draft Code.

23. Since the Vienna Convention of 1988 covered both narcotic drugs and psychotropic substances, it was desirable that the draft Code should also do so. In article X adopted by the Commission at its forty-second session (A/45/10, chap. II, sect. D.2), paragraph 3 should become paragraph 1, thus facilitating the interpretation of current paragraphs 1 and 2. His delegation noted with appreciation the scope of current paragraph 3. As to current paragraph 1, his delegation considered that activities carried out "within the confines of a State" could not be regarded as crimes against the peace and security of mankind, since they had no international consequences. In order to be regarded as such crimes, the activities in question would have to take place in a transboundary context. Activities carried out within a State that were not linked in any way to other types of activities should not be covered by the draft Code. In taking that approach, the Commission would be fulfilling the mandate entrusted to it by the General Assembly in resolution 44/39, which referred to "persons engaged in illicit trafficking in narcotic drugs across national frontiers". States could take domestic measures to regulate their citizen's activities in such a way as to ensure respect for the sovereignty, territorial integrity and political independence of other States.

24. The term "on a large scale" used in current paragraph 1 of article X, was vague, so that paragraph should be reworded. In current paragraph 2, the terms "who knows" and "in order to conceal" were too subjective. Colombia saw no reason why a distinction should be drawn between individuals who undertook, organized, facilitated, financed or encouraged illicit traffic in narcotic drugs and individuals who were involved in such activities through financial institutions, banks and investment companies. One category of individuals would be punished for having committed the crime itself, whereas in the case of the other category of individuals, it would be necessary to prove that they had known that the property in question had been derived from the crime. The individuals in the first category

(Mr. Alzate, Colombia)

were generally nationals of developing countries, whereas the second category involved individuals and institutions in developed countries. The terms in question must therefore be deleted from current paragraph 2.

25. Illicit traffic in narcotic drugs and psychotropic substances should be subject to the jurisdiction of a universally accepted international court or mechanism, under a code governing the various international criminal activities constituting a threat to all mankind. The establishment of an international criminal court was of particular importance in connection with narco-terrorism. Colombia therefore took a keen interest in the relevant discussions in the Commission.

26. A number of other interesting proposals had been put forward, such as the proposal made by Greece that failure to implement Security Council decisions should be included in the draft Code as a crime against world peace. Colombia believed that the same approach could be taken in respect of those who violated the principles of international law, particularly the principles laid down in the United Nations Charter. Furthermore, disregard for the Judgments of the International Court of Justice could also be characterized as a crime under the draft Code.

27. Mr. SZÉKELY (Mexico), commenting on chapter II of the Commission's report (A/45/10), concerning the draft Code of Crimes against the Peace and Security of Mankind, said that the Commission had appropriately reviewed earlier discussions by the United Nations on the possibility of establishing an international criminal jurisdiction. No concrete recommendations had emerged from any United Nations body which had considered the question, nor had Member States seemed very interested in expressing their views in those few cases where specific proposals had been made. That suggested that there was not enough support for establishing an international legal mechanism to ensure strict compliance with the draft Code.

28. Despite the improvement in international relations, profound differences still divided States with respect to various aspects of the issue, particularly the jurisdiction of the proposed court. Moreover, even if such differences were overcome, under the domestic legislation of many States, including his own, jurisdiction could not be transferred from domestic courts to an international court, and the establishment of special courts was not permitted.

29. At the time of the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, it had not been possible to agree on the establishment of a universal jurisdiction to deal with such trafficking, because that offence had not been described as an international crime. The signatories to the Convention had therefore simply agreed to take the necessary steps in accordance with their domestic legislation to promote international co-operation in that field, while strictly adhering to the principle of the sovereign equality of States. His delegation would be more willing now to consider the establishment of an international criminal jurisdiction if the vast dimension of the drug problem and the need to mount an integrated, global attack on

(Mr. Székely, Mexico)

it were widely acknowledged. Moreover, a complete definition of the crime and of its active subject must include the final user of the drugs.

30. His delegation, while recognizing the merit of including a text along the lines of draft article X as provisionally adopted by the Commission, did not agree with the Chairman of the Commission who, in introducing the report, had stated that the draft article represented further progress since it defined illicit drug trafficking as an international crime. Moreover, the draft article referred to trafficking "on a large scale". His delegation could accept the inclusion of the draft article in the draft Code only if it also qualified drug use as an international crime and covered small and medium-size producers and intermediaries, and not only those operating on a large scale.

31. With regard to article 18, on the recruitment, use, financing and training of mercenaries, his delegation regretted that the definition of "mercenary" had been derived from article 1 of the 1989 Convention on the subject. His delegation had not signed that instrument because it had reservations regarding the text.

32. Since the Commission was about to conclude its work on some of the items before it, it was appropriate to give some thought to its long-term programme of work. In general, his delegation agreed with the suggestion by the Working Group established to consider the subject, to the effect that new topics should be manageable with regard to their time requirements. His delegation also felt that the time-frame should not exceed the term of office of the Commission's members. The Commission should submit detailed reports to the General Assembly only after it had completed a global assessment of particular items before it, while recognizing that further work would be needed in the relevant drafting committees. Member States would thus have an opportunity to provide the Commission with general guidelines based on a broader perspective.

33. As to specific items which the Commission might address, his delegation agreed that the long-term programme of work should take into account the objectives of the Decade of International Law and the programme of action relating thereto. The views of Member States on the programme for the Decade would be of great importance, particularly those pertaining to the progressive development of international law and its codification. Two issues in particular were ready for codification: the legal principles regulating the protection of the environment and the legal aspects of international traffic in weapons. His delegation welcomed the suggestion that the Commission should consider requests for legal opinions on some pressing legal issues before the international community. In providing that very valuable service to the General Assembly, the Commission could use methods of work such as that followed in the handling of the question of an international criminal jurisdiction.

34. In conclusion, he stressed that the views expressed by the representative of Germany at the 33rd meeting, ideas shared in informal discussions among representatives in the Committee, and the work relating to the Decade of International Law would provide valuable contributions to the future work of the Sixth Committee and the International Law Commission.

35. Mr. GUEVORGIAN (Union of Soviet Socialist Republics) said that his Government would welcome the early completion of the Commission's work on the draft Code, whose main purpose was to enhance international co-operation in the prevention of crimes most dangerous to peace and mankind as a whole, and to ensure that those responsible for such crimes did not escape severe punishment. The Code was needed as an effective instrument to be used in the joint efforts by States to prevent the preparation and waging of nuclear war, and to combat such crimes as aggression, apartheid, international terrorism and illicit traffic in narcotic drugs. His delegation noted with satisfaction the positive work done on the draft at the Commission's forty-second session, and extended its thanks to the Special Rapporteur for his eighth report on the topic.

36. His delegation took a positive view of the Commission's provisional adoption of draft articles 16 (International terrorism), 18 (Recruitment, use, financing and training of mercenaries) and X (Illicit traffic in narcotic drugs), which represented a new and significant contribution towards the struggle against serious international crimes. It regretted, however, the Commission's failure to reach agreement on the draft article concerning breach of a treaty designed to ensure international peace and security, an issue directly related to the strengthening of law and order in international relations, and one which should on no account be left out of the draft Code.

37. With regard to questions of methodology arising in connection with complicity, conspiracy and attempt, his delegation took the view that the specific nature of the crime should be taken into consideration in each separate case; it might suffice, however, to adopt a general provision declaring complicity and conspiracy in the commission of international crimes to be punishable, leaving it to the court to determine the specific content of those crimes. In his country, complicity was viewed as a form of commission of a crime and as an aggravating circumstance. His delegation took the view that participants in international crimes should be classified as perpetrators, organizers, instigators or accomplices, depending on the specific role played by them in the commission of the crime. The degree and nature of participation should also be reflected in the sentence.

38. His delegation was pleased that an overwhelming majority of the Commission's members had expressed support for the establishment of an international criminal court in relationship to the United Nations, and that the Commission as a whole had noted that recent developments in international relations were conducive to such establishment. With regard to the scope of jurisdiction, he remarked that if the court was established as an organ of the United Nations, the Charter of the United Nations would have to be amended accordingly. If, on the other hand, the court was established as an autonomous body, its jurisdiction would be recognized only by States parties to its statute in respect of the crimes covered by the statute and by States parties to particular international conventions in respect of the crimes covered by those conventions.

39. As to the respective spheres of competence of national courts and of the international court, his delegation considered that concurrent jurisdiction would not be impossible, provided the respective spheres of competence were clearly delimited. At the same time, the possibility should not be excluded of the

(Mr. Guevorgian, USSR)

international court's acting as a court of first instance where national courts failed to take up a case involving the commission of an international crime. In that connection, he emphasized that none of the crimes recognized as such by the international community should be omitted from the draft Code. As to the court's jurisdiction over persons, his delegation noted that a number of complex issues still remained outstanding and would have to be considered at a later stage.

40. The preparation of the Code could be conducive to the establishment of a stable and peaceful world, and his delegation therefore considered that the Commission and the Sixth Committee should continue to give priority to the topic.

41. Mr. TÊTU (Canada) said that the Commission should strive, in its work on the draft Code, to elaborate a clear and comprehensive instrument based on existing customary and treaty law. A code listing offences taken directly from the major accepted international instruments would be most likely to receive broad support. To the extent that consensus could be reached on customary international law on the most heinous of international crimes, that, too, would provide an important contribution to the Charter system of collective security. In the process of elaborating a code the Commission also should aim to provide for the practical application of penalties.

42. Stressing the importance of the obligation of States to prosecute or extradite international criminals within their jurisdiction, he noted that some of the worst offences dated back to the Second World War. The international community should strive harder to ensure the effective application of existing international law in such cases. In the context of the United Nations Decade of International Law, his delegation urged more consistent prosecution of terrorists and other international criminals in domestic courts, pursuant to existing laws and agreements.

43. His delegation welcomed the constructive efforts made by the Commission in its work on general parameters for an international criminal court. While there was not yet an international consensus on the need for such a mechanism, the fact that there was now an international definition of aggression, and that the Commission had made considerable progress in the elaboration of an international code of crimes, suggested that it was appropriate to review the question. Crimes against peace, particularly the planning and waging of wars of aggression, generally had not been addressed in domestic law, and it was thus difficult for national courts to deal with them. Such crimes were most amenable to trial by an international court.

44. The Commission's proposals on a possible international court should not stray too far from existing customary and treaty law, or from what States had indicated they were prepared to implement. Perhaps the most logical approach would be to provide the International Court of Justice with additional jurisdiction to deal with international criminals. The Court might well be able, under its existing mandate, to determine in individual cases whether a crime was covered by international law, thus obviating the need to elaborate a code of crimes.

45. Mr. PUISSOCHET (France) congratulated the Commission's members and, in particular, the Special Rapporteur on the draft Code upon the scholarly skill which they had brought to the consideration of extremely complex issues in international penal law. Commenting first on the three articles in part one of the Special Rapporteur's eighth report he said that, so far as questions of methodology were concerned, his delegation would hesitate to agree with the approach which consisted in treating complicity as a separate offence. The general rule under French law was that an act of complicity derived its criminal nature from the principal crime; attempt did not constitute a separate offence, but was punishable, while complot constituted a separate offence in certain cases. Referring to the views reflected in paragraphs 74 and 75 of the report (A/45/10), he remarked that, given the very exceptional nature of the crimes covered by the Code, it would not seem appropriate to include attempt as a crime in each hypothetical case. The correct way for the Commission to proceed would be to consider, in connection with each crime which it intended to include in the Code, whether the concept of attempt was applicable to that crime. Similarly, the Commission should consider whether the general rules relating to complicity were appropriate in the case of each of the crimes concerned, and also whether the concept of complot could be usefully applied. Only after such an exercise would the Commission be in a position to decide upon the future fate of the articles it had considered at its forty-second session.

46. With regard to the text of the new version of the article on complicity, he agreed with the Special Rapporteur and with those members of the Commission who had argued that there was no need to try to define the principal perpetrator of the offence; the distinction between co-perpetrator and accomplice was sometimes difficult to draw, and it should be left to the judge to determine the responsibility of each of the accused. On the other hand, he could not agree with the statement in paragraph 2 of the original version of draft article 15 that "complicity may mean both accessory acts prior to or concomitant to the principal offence and subsequent accessory acts", nor accept without further in-depth consideration the passage appearing in square brackets in the new version of the draft article. In French law, complicity arose only as a result of accessory acts prior to or concomitant with the principal offence, and he could see no good reason for extending the concept to include assistance given to the perpetrator after the commission of a crime. With the exception of that point, the new version of draft article 15 was on the whole acceptable to his delegation.

47. As for the inclusion in the draft Code of a reference to conspiracy, his delegation had no objection of principle, provided that the concept was applied only to crimes against peace in accordance with the principle adopted by the Nürnberg Tribunal, and to conspiracy to commit genocide as punishable under article III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; any other application would have to be considered and debated with the utmost care.

48. Discussions had taken place in the Commission on the question of whether the draft Code should include articles on international illicit traffic in narcotic drugs and on breach of a treaty designed to ensure international peace and security. His delegation was seriously concerned at the direction which the Commission's work was taking in regard to the list of crimes to be covered by the

(Mr. Puissochet, France)

Code. The credibility of the project as a whole depended on the intellectual rigour applied in determining what acts could be considered crimes against the peace and security of mankind. Not all illicit acts, however serious, and not all morally condemnable acts, however repugnant, fell into that category. The Code should include only breaches of legal rules accepted by States that were considered sufficiently serious to constitute crimes against the peace and security of mankind; the constituent elements must be defined with the utmost clarity. The current list of offences failed to meet those requirements.

49. In that connection, he endorsed the views of one member of the Commission as reflected in paragraph 84 of the report. As for the proposed wording of article X as provisionally adopted, his delegation did not consider it sufficiently precise to serve as a basis for the competence of an international jurisdiction.

50. Likewise, his delegation continued to believe that the inclusion of an article concerning breach of a treaty designed to ensure international peace and security would be unfounded and unwise, and he could only urge the Commission to drop the idea once and for all.

51. Turning to the question of the establishment of an international criminal jurisdiction, he said that the implications of the various options envisaged required more thorough analysis by the Commission before States could express an informed opinion. Noting that interest in the idea had increased recently, he emphasized the importance of carefully analysing the problems involved. As to the efficacy of the proposed jurisdiction, it was necessary to determine, for example, what types of offences could not be adequately punished under existing national procedures, and what the advantages would be of bringing a case before an international jurisdiction. Many complex issues pertaining to the functioning of such a jurisdiction had yet to be resolved.

52. Two major considerations must be taken into account with respect to the competence of the proposed jurisdiction. Firstly, such a jurisdiction was justified only in the case of particularly heinous crimes which by their very nature constituted an affront to the world's conscience and a threat to the functioning of international society; and secondly, its competence must be established with the utmost clarity and must be thoroughly spelt out in a very carefully drafted instrument. Major technical difficulties would arise if efforts were made to bring before an international court acts covered by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, since that instrument, as well as the articles proposed by the Special Rapporteur, did not clearly define the crime. The content and definition of the crime were determined by national legislation. An international court faced with an international drug-trafficking case might first have to lay down rules in the event of a conflict of legislation, which was not the role of such a jurisdiction. The efficacy of recourse to an international court was also questionable unless an international system also existed to govern the execution of sentences. Moreover, it was illusory to assume that criminals would be treated equally, given the diversity of legislation.

(Mr. Puissochet, France)

53. With regard to the three models proposed, his delegation had very serious doubts as to the possibility of establishing an international jurisdiction with a review competence over national courts. Such an arrangement would, inter alia, undermine the authority of national courts. An international criminal court with exclusive jurisdiction would be more logical, notwithstanding all the difficulties to which it would give rise. As to the institutional structure, serious thought should be given to the possibility of establishing specialized ad hoc international criminal jurisdictions.

54. Criminal justice had thus far depended on the strength, organization and legitimacy of the State, attributes which did not necessarily have equivalents in international society. Nothing would be worse than to establish a system which had not been adequately studied and which, instead of strengthening the repression of the most heinous crimes, created confusion and undermined the concept of international justice. By analysing precedents and doctrine, particularly as developed between the two world wars, the Commission should be able to shed light on the complex issues involved.

55. Mr. HANAFI (Egypt) said that despite initial disagreement between Member States as well as members of the International Law Commission over the draft Code of Crimes against the Peace and Security of Mankind, the Commission had now nearly completed the first reading of the draft Code. It was time to seek a consensus in the General Assembly by allaying the misgivings of some Member States, which he thought were related more to procedural than to substantive matters.

56. It was important that draft article 15 on complicity should stress that the acts constituting the crime had to be carried out in concert, a point which was insufficiently clear in the proposed text. It was also important to make clear distinctions between complicity, attempt and conspiracy. In addition to a definition of complicity, the text should contain a general definition of the principal perpetrator of the crime.

57. Draft article 16 on conspiracy covered what were known in some legal systems as criminal agreements. The proposed text did not clarify the basic elements of conspiracy; rather, it gave rise to confusion between the concepts of conspiracy and complicity. He reiterated the need for a clear distinction, even if more detailed formulations were required. Regarding draft article 17 on attempt, he supported the definition in the report, provided that it excluded mere intent and preparatory acts not followed by execution.

58. Illicit traffic in narcotic drugs was clearly a crime against humanity; in view of the violence, robbery and threats to stability recently associated with it, his delegation did not object in principle to considering it also a crime against peace. However, the text should clearly distinguish between what made it a crime against peace and what made it a crime against humanity.

59. The Drafting Committee had held a long discussion on the draft article concerning breach of a treaty designed to ensure international peace and security, but had been unable to reach agreement. One problem lay in determining which

(Mr. Hanafi, Egypt)

treaties were in that category. In addition, it was feared that such an article would discriminate against States which had entered into the treaties concerned as compared to States which had not done so, and would also raise fundamental questions of treaty law. There might be room for such a provision if the treaties in question were of universal application, but that was far from being the case for all such treaties.

60. The establishment of an international criminal court was still a matter for much discussion in the international legal community. At its forty-second session, the International Law Commission had put forward ideas and alternatives in an attempt to find common ground between the supporters and opponents of such a court. His delegation would examine the issue carefully and hoped for a solution which would meet with the approval of all the parties and the various legal systems.

61. Mr. BENMEHIDI (Algeria) said that the Commission had achieved considerable progress on the draft Code of Crimes against the Peace and Security of Mankind. That was in no small measure due to the efforts of the Special Rapporteur to overcome the hesitations members of the Commission had expressed at the outset in view of the complexity and political scope of the topic. At its forty-second session, the Commission had paid particular attention to the questions of complicity, conspiracy and attempt. With regard to methodology, it had been asked whether such acts should constitute a distinct class of offences within the draft Code, or whether they should be regarded as accessory to the principal crime. In view of the extremely serious nature of crimes against the peace and security of mankind, complicity, conspiracy and attempt must be regarded as separate offences in order to strengthen the deterrent aspect of the Code.

62. The distinction between being the principal and the accomplice had been rendered extremely difficult by the sheer scale of organized crime and its internationalization. He was pleased to note that the revised version of draft article 15 proposed by the Special Rapporteur seemed to have taken into account the common concern of members of the Commission to make a provision for the criminal liability of individuals carrying out official functions.

63. His delegation could not share the view, referred to in paragraph 61 of the Commission's report (A/45/10), that the draft Code should not contain separate provisions on complicity and conspiracy. It agreed with the Special Rapporteur that, in the case of conspiracy, no distinction was made between direct perpetrators and indirect perpetrators, perpetrators and co-perpetrators, or perpetrators and accomplices, since all were acting in concert (para. 66). The draft Code should not have a scope more limited than that of the Conventions on genocide, apartheid, narcotic drugs and slavery, which had tended to confirm the trend towards distinguishing between conspiracy and complicity. The revised version of article 16 as proposed would, in his delegation's opinion, provide a definitive definition of conspiracy under international law.

64. The Commission could give greater priority to attempt in order to arrive at a more rigorous definition of the notion. His delegation took issue with the view expressed in paragraph 71 of the report that attempt was more easily conceivable in

(Mr. Benmehidi, Algeria)

the case of a crime against humanity than in the case of a crime against peace. In his delegation's view, the two were closely linked. Article 17 should include a definition of commencement of execution, while explicitly mentioning preparatory acts, which were of cardinal importance in a case involving an attempt against peace.

65. In general, his delegation was in favour of the draft. At the same time, it adhered to the principle of nullum crimen sine lege. It therefore considered it necessary to restrict the substantive competence of the proposed court to the crimes listed in the draft Code. Such a choice would undoubtedly have the drawback of rendering the establishment of the court subordinate to finalization of the draft Code. None the less, his delegation remained reasonably optimistic with regard to the outcome of the Commission's efforts. With respect to individual criminal responsibility, and in particular the possibility of extending the scope of application of the draft Code to States, Algeria considered that attribution of criminal responsibility to States would be an essential aspect of the draft. The best way to ensure that the future legal instrument was both credible and effective would be for the Code to provide for a dual régime, with criminal responsibility attributable to physical persons or to legal persons, including States.

AGENDA ITEM 139: PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (continued) (A/C.6/45/L.7)

66. The CHAIRMAN introduced draft decision A/C.6/45/L.7.

67. Draft decision A/C.6/45/L.7 was adopted.

AGENDA ITEM 144: REPORT OF THE SPECIAL COMMITTEE ON THE CHARTER OF THE UNITED NATIONS AND ON THE STRENGTHENING OF THE ROLE OF THE ORGANIZATION (continued) (A/C.6/45/L.3, L.4)

Draft resolution A/C.6/45/L.3

68. The CHAIRMAN announced that Mexico had joined the sponsors of the draft resolution.

69. Mr. MADI (Egypt), introducing the draft resolution, drew the Committee's attention to paragraph 3, which was the most important element of the text in that it concerned the mandate of the Special Committee on the Charter for its 1991 session. The informal consultations on the draft resolution had been conducted in a very constructive atmosphere, all participants endeavouring in a spirit of co-operation and understanding to reach a generally agreed text. The sponsors hoped that the draft resolution would be adopted without a vote.

70. The CHAIRMAN said that a vote had been requested by the Libyan Arab Jamahiriya.

71. Draft resolution A/C.6/45/L.3 was adopted by 94 votes to none, with 1 abstention.

72. Mr. ORDZHONIKIDZE (Union of Soviet Socialist Republics), speaking in explanation of vote, said that his delegation was pleased to note the almost unanimous adoption of draft resolution A/C.6/45/L.3, which underscored the fact that the overwhelming majority of States had a positive approach to the work of the Special Committee. There seemed to be general agreement that it should endeavour to complete its consideration of the proposal on fact-finding as soon as possible, preferably at the Special Committee's next session. His delegation also welcomed the broadening of the Special Committee's agenda to include such matters as co-operation between the United Nations and regional organizations, the strengthening of the role of the Secretary-General, and sanctions against States which had violated international peace.

73. It would not be in the best interests of the Special Committee's mandate to expand the membership.

74. Mr. ELHUNI (Libyan Arab Jamahiriya) said that his delegation had abstained from voting since the draft resolution contained no new proposals which would encourage the Special Committee to take an active part in strengthening the role of the United Nations in maintaining international peace and security. The end of regional blocs in Europe, the end of the cold war and the new-found international harmony were welcomed by the small countries, which had been the objects of competition and had provided a testing-ground for weapons of the major Powers. Account should be taken of those new circumstances, which differed from those obtaining at the time of the adoption of the Charter.

75. His delegation had drawn attention to the danger of the right of veto in the Security Council, which created tension in international affairs and thwarted the safeguarding of international peace and security. It had proposed at various bilateral, regional and international meetings that that privilege should be abolished. Its initiative had received clear support from the Movement of Non-Aligned Countries, the Organization of African Unity and the Organization of the Islamic Conference.

76. The Sixth Committee should have adopted a serious draft resolution directing the Special Committee away from irrelevant theoretical discussion and encouraging it to take practical and positive steps to draft provisions which would ensure equality, equal participation and justice for Member States without discrimination in terms of responsibility for strengthening international peace and security. His delegation continued to urge that the Special Committee should consider four sets of measures: measures to strengthen the role of the Security Council and to eliminate the adverse effects of misuse of the principle of consensus among the permanent members; measures to emphasize that international peace and security should be the joint responsibility of all Member States on the basis of equality, sovereignty, democracy and equal participation in the management of international affairs; measures to enhance the role of the General Assembly in the maintenance of international peace and security; and measures to expand the membership of the Special Committee and to adopt the principle of rotation and equitable geographical representation. When those just demands were reflected in a draft resolution, his delegation would be foremost among its supporters.

77. Mr. KUFUOR (Ghana) said that while he had gladly supported the draft resolution, his understanding of paragraph 4 was that the procedures for arriving at decisions, as set out in the Charter of the United Nations and the rules of procedure of the General Assembly, remained intact and would also govern decision-making within the Special Committee.

78. Mr. FLEISCHHAUER (Under-Secretary-General, The Legal Counsel) informed the members of the Committee that, in accordance with paragraph 6 of draft resolution A/C.6/45/L.3, the Secretary-General would submit a final report on the draft handbook on the peaceful settlement of disputes between States to the Special Committee at its next session, currently scheduled for 4 to 22 February 1991. The report would contain a composite text of the draft handbook, not including the annexes, indexes and bibliography, which would be included at a later stage. It would be possible for the Secretary-General's report to be circulated towards the end of January 1991.

79. During the preparation of the draft handbook, each section and chapter had been reviewed by a consultative group at eight meetings convened for that purpose. He expressed appreciation to the group for the professional manner in which it had approached its task and for its suggestions, which had been taken into account in the composite text. As that text would not be available until January 1991, he did not anticipate that it would be resubmitted to the group. It would be for the Special Committee to decide, in considering the composite text at its next session, whether to recommend to the General Assembly at the forty-sixth session that it should be published.

Draft resolution A/C.6/45/L.4

80. Mr. DELON (France), introducing the draft resolution on behalf of its sponsors, said that it was based on the work of the Special Committee at its previous session, which had led to an agreement on the draft document reproduced in paragraph 86 of document A/45/33. The conclusions of the Special Committee, which were set out in the annex to document A/C.6/45/L.4, would facilitate the work of the United Nations on the basis of modest, but practical, recommendations on the rationalization of its procedures. The sponsors hoped that the draft resolution could be adopted without a vote.

81. The CHAIRMAN said that Cuba had requested a vote.

82. Mrs. SILVERA (Cuba), speaking in explanation of vote, said that her delegation had requested a vote because of reservations concerning paragraph 1 of the annex. The approach suggested in that paragraph would tend to institutionalize decision-making by consensus in the General Assembly, a practice which Cuba regarded as unacceptable. The economic capacity and political strength of the major Powers enabled them to influence decision-making, a situation which did not favour third-world countries. While her delegation was not opposed to consultations, it felt that they should not be a vehicle for introducing a mandatory rule of consensus into the function of the General Assembly.

83. A recorded vote was taken on draft resolution A/C.6/45/L.4.

In favour: Afghanistan, Algeria, Argentina, Australia, Austria, Bahrain, Barbados, Belgium, Benin, Bolivia, Botswana, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cameroon, Canada, Chile, China, Colombia, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Ghana, Greece, Grenada, Guatemala, Guinea-Bissau, Guyana, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Lesotho, Libyan Arab Jamahiriya, Liechtenstein, Madagascar, Malawi, Mali, Mauritania, Mexico, Mongolia, Morocco, Mozambique, Nepal, Netherlands, New Zealand, Niger, Nigeria, Norway, Oman, Pakistan, Peru, Poland, Qatar, Romania, Rwanda, Saudi Arabia, Singapore, Spain, Swaziland, Sweden, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Uruguay, Venezuela, Viet Nam, Yugoslavia, Zaire.

Against: None.

Abstaining: Cuba.

84. Draft resolution A/C.6/45/L.4 was adopted by 92 votes to none, with 1 abstention.

The meeting rose at 1 p.m.

UNITED NATIONS

General Assembly

FORTY-FIFTH SESSION

Official Records

SIXTH COMMITTEE
35th meeting
held on
Thursday, 8 November 1990
at 3 p.m.
New York

SUMMARY RECORD OF THE 35th MEETING

Chairman: Mr. MIKULKA (Czechoslovakia)

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Distr. GENERAL
A/C.6/45/SR.35
26 November 1990
ENGLISH
ORIGINAL: FRENCH

90-56985 3178S (E)

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 142: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (continued) (A/45/10, A/45/469)

AGENDA ITEM 140: DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND (continued) (A/45/10, A/45/437)

1. Mr. DLAMINI (Swaziland), referring to the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed certain crimes, agreed with the International Law Commission that the establishment of such a mechanism was more feasible than ever. He also shared the opinion of certain delegations that the final creation of the court must await the entry into force of the draft Code of Crimes against the Peace and Security of Mankind, or at least that it should be established at the same time as the Code entered into force. In any event, it would be fitting if both were established by 1995 at the latest.

2. There was indeed no reason to wait until all international crimes against the peace and security of mankind were defined in the Code before applying it. The Code could be enforced in stages if necessary, even if that meant progressively incorporating certain other crimes against the peace and security of mankind which, although internationally recognized as serious, were not yet sufficiently clearly defined to be included in the Code. It would be unfortunate, however, if a decision had already been taken to delay adoption of the Code until an exhaustive list of international crimes was drawn up.

3. His delegation endorsed the proposed treatment of international illicit traffic in narcotic drugs and psychotropic substances as a crime against the peace and security of mankind and shared the views expressed in paragraphs 77 and 78 of the Commission's report, whereby such traffic was detrimental to the peace and security of mankind and constituted a scourge and grave threat to mankind. It doubted, however, that there was sufficient basis for a twofold characterization of the crime, as proposed by the Special Rapporteur. The mere intervention of the State in draft article Y (crime against humanity) did not appear to justify the dual characterization, because ultimately only individuals would be held responsible for that offence. It would be better to adopt a single draft provision treating the offence as a crime against the peace and security of mankind, as had been proposed by one member of the Commission, because the twofold characterization might in practice give rise to a splitting of charges if two counts arising out of the same offence were preferred against the same defendant.

4. With regard to the draft articles relating to complicity, conspiracy and attempt, his delegation, while appreciating the Special Rapporteur's endeavours to improve on the original versions, felt that the new versions were not without some inherent difficulties of their own. Both complicity and conspiracy were defined in terms of "participation" in the commission of a crime, but the text contained no definition of the latter concept. If attention was to be focused on the acts which

(Mr. Dlamini, Swaziland)

constituted a crime of complicity or conspiracy, there was no longer any reason to make "participation" the key element of the definition. Hence, the draft article relating to attempt read comparatively better; it defined the crime of "attempt" in terms of attempt and then proceeded to define the word "attempt".

5. The reason for the separate treatment of preparatory acts of complicity and conspiracy would appear to be a desire to charge and punish an accomplice less severely than the perpetrator of the substantive offence. Thus, acts of participation constituting crimes of complicity and conspiracy would amount to less than actual perpetration of the offence. However, the draft article did not describe acts of "participation" sufficiently clearly to bring out the element of degree apparent in the definitions. One was therefore left to wonder why, if A helped B to climb a wall in order to commit a burglary, A should get off more lightly than B. Why, in other words, charge a person for only part of a crime if in fact the whole crime was committed with his participation?

6. The draft articles relating to complicity and conspiracy could make it more difficult to prove the offence and consequently accord an unfair advantage to the defence. An accomplice was usually a person who participated in the commission of a crime and not simply a person who participated only partially. The article on complicity changed that customary understanding by defining an accomplice as a person who could not be charged and convicted of the substantive crime but only of a secondary participatory offence.

7. It might perhaps be more prudent, if it was impossible to lay down a simple definition for crimes of complicity and conspiracy, to allow the court itself to determine the degree of criminal responsibility of A and B, in a case where A helped B to carry out a crime, and to reflect the distinction, if any, in the sentences imposed rather than in the offences with which they were charged. If, on the other hand, no crime other than certain preparatory acts had actually been committed, the situation would be equivalent to that of attempt, as specified in draft article 17.

8. The difficulty with incomplete crimes of that sort was no doubt due to a desire to distinguish between: (1) mere preparatory acts; (2) the commencement of execution; and (3) the crime itself. The need clearly to define all offences was appreciated, but that concern should not be taken too far. The definitions of complicity and conspiracy could be left at the level of general principle, because there might be cases in which an accomplice, in the terms of draft articles 15 and 16, should be punished more severely than the actual perpetrator of an offence. One was entitled to wonder in such cases why the law would prevent that possibility, despite the fact that justice required it, by minimizing in advance the role of the accomplice.

9. Furthermore, conspiracy (draft article 16) was not defined as a crime in the same way as complicity or attempt. It did not seem right that a simple conspiracy to commit a crime should be treated as equivalent to the crime itself. That draft article might have to be reformulated.

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10. Returning to the question of an international criminal trial mechanism, the plan might require some internal readjustments but would be unlikely to cause serious disruption to national trial systems. The system of universal jurisdiction for the prosecution of international crimes had probably been tolerated because it was the only system available. It was true that an international court would have the advantage of pronouncing more objective and uniform decisions than national courts. The question of whether it should be a chamber of the International Court of Justice - in which case it might be necessary to amend the Statute of the Court - or an independent institution should depend not so much on the recommendation of the Court as on considerations of a practical nature.

11. The future court should be composed in such a way that its members, rather than simply representing the main legal systems of the world as at the International Court of Justice, were drawn from the broadest possible field. On the other hand, the judges, while permanent, should not have to reside permanently at the court's headquarters. They could sit as and when their services were required.

12. The proposed court should not curtail the sovereignty of States. If the draft Code of Crimes was incorporated into national criminal law and the international court was recognized as an extension of the national judicial system, there should be no reason to fear any loss of sovereignty. Moreover, at a time when many national judges were subject to extreme pressure and threats of violence from very powerful international criminal networks, from their own Governments or from Government-sponsored elements, an international court would be less susceptible to such eventualities and therefore offer a better mechanism. A single centralized jurisdiction would be preferable to the multiple trial systems which might exist under national arrangements, all purporting to promote international justice and the peace and security of mankind.

13. With respect to the nature of the court's jurisdiction, the first of the options set out in paragraph 130 of the report was the most fitting. The court would be established following the adoption of the Code of Crimes. There would be no point in having a court with only nebulous jurisdiction to hear international criminal cases brought before it on a case-by-case basis or pursuant to bilateral arrangements between States. Countries were generally reluctant to submit their disputes to strangers who were not parties to an agreement with those in dispute. A convention was therefore the most appropriate instrument by which to establish the court and to adopt the Code. However, if the convention procedure would delay adoption of the Code, his delegation would have no objection to its being adopted - and to the inclusion of new crimes and establishment of the court - by means of a resolution of the General Assembly.

14. It was to be expected that the Commission would have difficulty when trying to extend the jurisdiction of the court to States. Even in the best of democracies it would be very difficult to punish the State as such for a criminal offence, except by identifying the individual officials closely connected with the perpetration of the crime. It followed that only States parties could submit cases to the court.

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That would also obviate the problem of the enforcement of judgements handed down by the court without incurring the additional expense of establishing an international police force and prison service. It would also follow that intergovernmental organizations of a universal or regional character, as well as non-governmental organizations and individuals, might report to the court or another associated body any alleged contraventions of the Code which were ignored or improperly investigated by a State party. The Court would then have to carry out an investigation with a view to persuading the State in question to submit the case to it, if there was a case, in accordance with that State's obligation under the Code.

15. If a State party had difficulty in carrying out an investigation, it might call for assistance from neighbouring States parties not connected with the alleged crime. Convicted offenders might serve their terms of imprisonment in other countries if their own Governments would have difficulty in enforcing the sentence of the court. Moreover, such an arrangement would be cheaper than an international police force and prison service.

16. The creation of alternative international trial arrangements outside the ambit of the proposed court might undermine the usefulness of the court and make its existence questionable. It might be desirable for the statute of the court to include a provision authorizing it to hear international criminal cases which had not been dealt with under some other arrangements made by States. However, the court should have the option of refusing to hear such cases if it thought that its intervention would serve no useful purpose or that the case was not of an international character bearing on the peace and security of mankind.

17. As to whether the court should also provide advisory services by way of legal opinions, his delegation thought that such services should be provided only on the basis of recognition of an exclusive original jurisdiction of the court to determine the guilt of persons charged under the Code. Advisory services might then be provided in respect of international crimes remaining outside the Code or crimes whose international character was in dispute. However, the advisory or review services of the court should not be extended to States which did not recognize its exclusive jurisdiction under the Code.

18. The court and the Code of crimes should be established in the same instrument. If funds allowed, the court should be independent and have a permanent panel of judges and prosecuting attornies. His delegation could accept a court established under the Charter of the United Nations, for the important thing in the final analysis was to establish an efficient and cost-effective mechanism. But the structure of the court and its relationship with the United Nations required further study. Where the legal force of judgments was concerned, the judgments of the court should take precedence over those of other courts. The court should have full discretion in determining sentences. However, the death penalty should be excluded from the Code, although its omission would in no way detract from the seriousness of the crimes covered by the Code or from the determination of the international community to put an end to the cancer of international criminality.

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19. The problem of the breach of a treaty designed to ensure international peace and security, dealt with in paragraphs 89 to 92 of the report, might be profitably handled at the level of general principle without reference to any specific treaty.

20. Mr. DEL POZO CARAFA (Bolivia) said that, with regard to draft articles 15, 16 and 17, submitted by the Commission in paragraphs 33 to 76 of its report, his delegation shared the view stated in paragraph 35: Complicity, conspiracy and attempt were only punishable in connection with the principal crime and were therefore of an accessory character. Consequently, they should be placed in the part of the draft Code dealing with general principles.

21. With regard to complicity, his delegation proposed a new wording for paragraphs (a) and (c) of the new version of draft article 15 submitted by the Special Rapporteur (footnote 27). The paragraphs should read as follows:

> "The following are acts of complicity:
>
> (a) Aiding or abetting in any way the commission of a crime, even if it would otherwise still have been committed;
>
> (c) Furnishing aid or assistance after the commission of a crime by virtue of promises made prior to its commission."

Paragraph (b) was perhaps drafted in excessively general terms.

22. Where conspiracy was concerned, his delegation shared the view of the member of the Commission referred in paragraph 65. It also agreed with the distinction drawn by the Special Rapporteur in paragraph 66 between conspiracy and complicity. However, to make matters clearer, it proposed that paragraph 2 of the new version of draft article 16 submitted by the Special Rapporteur (footnote 29) should read as follows:

> "Conspiracy means any agreement between two or more participants to commit jointly a crime against the peace and security of mankind."

23. With regard to attempt, his delegation proposed that the words "independent of the perpetrator's intention", which appeared at the end of the second paragraph of the new version of draft article 17 (footnote 31), should be replaced by "alien to the perpetrator's intention".

24. The chapter of the report concerning international illicit traffic in narcotic drugs was of vital importance. It was a cause for satisfaction that the efforts of the Committee and the Commission had resulted in draft articles X and Y (footnote 34), which made illicit traffic in narcotic drugs a crime both against peace and against mankind. However, while it was true that the Special Rapporteur on the topic had taken into account inter alia the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988, it was regrettable that he had not given an adequate summary of

(Mr. Del Pozo Carafa, Bolivia)

the provisions of its article 3. While the need to include traffic in narcotic drugs in an instrument such as the draft Code could not be denied, it should not be forgotten that the international community already had the 1988 United Nations Convention, which would shortly enter into force, and should make a concerted effort for its universal application.

25. With regard to the creation of an international criminal jurisdiction, it should be asked whether the international community was ready to assume full responsibility for that undertaking, whether the court would be capable of standing above the political contingencies and the specific considerations of each State and whether the moment was right for the creation of a tribunal of that nature. Those questions still had not been clearly answered. Of the three options proposed in paragraph 130 for the nature of the court's jurisdiction, Bolivia would prefer the second, establishing concurrent jurisdiction between an international criminal court and national courts. Under that option, the States parties to the court's statute would not have to renounce their national jurisdictions and would be able to decide, on a case-by-case basis, whether to institute an action before the international criminal court or to exercise their own jurisdiction. The institutional structure of the court could be established by a separate convention between the States parties.

26. Finally, his delegation urged the Commission to make efforts to reconcile the different views on the inclusion in the draft Code of crimes against the peace and security of mankind of the breach of treaties designed to ensure international peace and security, such as arms control and disarmament treaties, as such breaches would, by definition, endanger the peace and security of mankind.

27. Sir Arthur WATTS (United Kingdom) said that recent events in the Persian Gulf demonstrated all too clearly the relevance of the topic of the draft Code of crimes against the peace and security of mankind. The catalogue of the international legal obligations which had been violated was endless. It must be made clear that individuals were personally responsible for crimes of that nature, since the responsibility of the State, if there was such responsibility, was not in itself a sufficient response.

28. With regard to the possible establishment of an international criminal court, his delegation wished first of all to thank the Commission for its swift and helpful response to the General Assembly's request. The report under consideration set out lucidly the issues involved and the various questions which needed to be answered. The undertaking was of great importance at the legal, political and practical levels. The establishment of a standing international criminal court would mark a significant step forward, but if serious thought was to be given to a code of crimes, equally serious thought should be given to the machinery for its implementation. His delegation had five observations on that subject.

29. The first was that, if an international criminal court was to be established, its existence should not in any way affect the jurisdiction of national criminal courts, particularly with regard to the finality of their judgements, where those courts already had jurisdiction under existing treaties. Relevant examples could

(Sir Arthur Watts, United Kingdom)

be found under the Geneva Conventions and under various international conventions which provided for jurisdiction on the principle aut dedere, aut judicare.

30. The second was that it would be better to continue to consider the undertaking in the context of the implementation of the Code, and not as a separate matter. The third was that the international court should not be considered as the only way to deal with international crimes: national criminal jurisdiction could provide more appropriate and more effective ways of dealing with many international crimes. The traffic in narcotic drugs was a case in point: it was doubtful whether an international court would be a useful ally in the war against drugs. The primary justification for an international criminal jurisdiction must be that there were international crimes, such as waging aggressive war, crimes against humanity, etc., which could not be dealt with by other means.

31. The fourth point was the widespread assumption that the proposed court would be a court of first instance, such as the Nürnberg Tribunal, and not an appeal court or a court of review. It would be easier, as the Commission had acknowledged, to make the court an appeal court than to give it the task of actually conducting trials.

32. Finally, and, once again, as the Commission had pointed out, the prosecution of serious international crimes might require prior authorization. Careful consideration should be given to that question, in view of the nature of certain high crimes and the status of those most likely to be accused of committing them. One possibility was for the decision to prosecute them to be taken by a body representing the international community, such as the Security Council.

33. His delegation had certain reservations concerning the Commission's work on the draft Code. First, the conceptual problems to which many delegations had already drawn attention had still to be addressed. The Commission should concentrate on the most serious and widely recognized international crimes. The debate on the concepts of complicity, conspiracy and attempt had also been difficult. Those questions were technical and invited controversy. In any event, it was impossible to comment in detail on the draft articles without seeing them in the context of the Code as a whole, and that was not yet ready.

34. His delegation welcomed the attention given by the Commission to the question of illicit traffic in narcotic drugs. It looked forward with great interest to proposals which could contribute to the suppression of that traffic. It remained to be seen whether the inclusion of an express provision in the Code would have any practical benefit. The best way of tackling that problem might perhaps be through the better enforcement of national criminal law, combined with improved international co-operation.

35. Draft article 16 on international terrorism, which had been provisionally adopted (note 27) was rather surprising. It was worrying that the article appeared to exclude the majority of terrorist acts, including such acts as crimes of terrorism, which were already covered by several international conventions. The war against terrorism was as important as the war against drugs; they must both be given the same attention.

36. Mrs. BELLAMINE-DLIMI (Tunisia) said that the draft Code of crimes against the peace and security of humanity was a valuable reference instrument, as it expressed the teachings of the most highly qualified publicists of the world's different legal systems and schools. As such, it could already be applied by the International Court of Justice, since the Statute of that Court stipulated, in Article 38, paragraph 1, that the Court should apply: "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

37. The planned instrument should contain, on the lines of criminal law, a preventive dimension and a punitive dimension. The Code would therefore be incomplete if it did not stipulate the punishments applicable to the crimes which it covered. It should also follow the terminology of international treaties. Finally, it should give greater space to the question of State responsibility, particularly with regard to crimes against peace which were usually committed by States, as well as to certain crimes against humanity, such as genocide and apartheid.

38. Turning to the "related offences" of complicity, conspiracy and attempt (paras. 33-76), she made two observations of a methodological nature: first, a precise definition of those three concepts was needed, while the task of deciding on their applicability should be left to the competent court; second, the Code could refer to those concepts in the part dealing with general principles and define them subsequently in a specific part.

39. With regard to the concept of complicity, her delegation noted with satisfaction that the new version of draft article 15 (note 27) covered both physical and intellectual acts and addressed the question of the temporal succession of acts of complicity. Thus, aiding the direct perpetrator after the commission of the crime could constitute an act of complicity, provided the intentional element was established. It would also be necessary to specify in paragraph (c) that, in order to constitute acts of complicity, acts occurring after a crime must have been committed on the basis of an understanding or an agreement, entered into before or after the commission of the crime.

40. Secondly, with regard to conspiracy, the Special Rapporteur had rightly included a separate provision on that notion in the draft Code. The original version of draft article 16 (note 28) seemed preferable to the new version (note 29) in that it was more explicit about the question of responsibility and, in the two alternatives in paragraph 2, highlighted both the individual and collective dimensions of responsibility. In other words, each participant in a conspiracy was responsible not only for the acts he personally committed but also for all the acts committed collectively by all the parties to the conspiracy. Only the degree of culpability and the penalty imposed would vary according to individual participation. Furthermore, conspiracy differed from complicity in that, in the case of conspiracy, no distinction was made between direct perpetrators and indirect perpetrators.

41. Lastly, with regard to attempt, it was a concept that was not included in the charters of the international military tribunals or in the Principles of

(Mrs. Bellamine-Dlimi, Tunisia)

International Law Recognized in the Charter of the Nürnberg Tribunal, nor was it in the 1954 draft Code. Her delegation agreed with the definition of attempt given in the new version of draft article 17 (note 31) but considered that that concept should be reserved for crimes against humanity, since it was difficult, in the case of crimes against the peace and security of mankind, such as aggression, to distinguish between commencement of execution and the act itself.

42. With regard to the breach of a treaty designed to ensure international peace and security (paras. 89 to 92), her delegation considered that a separate draft article should not be included in the draft Code, for various reasons: the draft article unjustifiably focused on treaty obligations; it violated the principle of universality which must underlie the concept of crimes against the peace and security of mankind; it discriminated against States which had entered into those treaties as compared to States which had not done so; and finally, it raised fundamental questions of treaty law, e.g., in the area of validity and interpretation of treaties.

43. On the subject of international illicit traffic in narcotic drugs (paras. 77 to 88), her delegation supported the Special Rapporteur's initiative in submitting two draft articles, one treating international traffic in narcotic drugs as a crime against peace and the other treating it as a crime against humanity, in that it threatened the health and well-being of mankind as a whole and thus of humanity.

44. Referring to the question concerning the establishment of an international criminal jurisdiction (paras. 93 to 157), she said that developments in international relations and the scale reached by organized international crime contributed to making the idea increasingly feasible. The misgivings of those who pleaded national sovereignty and the régime of universal jurisdiction of national courts could be countered by the argument that an international court had the recognized advantage of uniform application of the law. With regard to the subject-matter of such jurisdiction, out of the three options presented by the Special Rapporteur (para. 123), her delegation preferred option (i), according to which the court would exercise jurisdiction over the crimes defined in the Code, namely the most serious crimes as agreed to by the international community. To those who might object that that option would delay the establishment of the international court until the Commission's work on the draft Code had been completed, it could be contended that before establishing the court it was necessary to define the subject-matter on which it would be required to give judgement.

45. On the subject of submission of cases to the court, her delegation considered that all States parties to the court's statute should have the right to submit cases, in view of the gravity of the crimes it would have before it. As to penalties, the solution would be to draw up a general description of applicable penalties, leaving it to the judge to apply the appropriate penalty in each specific case. From the point of view of structure, the court should be a permanent body established by an amendment to the Charter of the United Nations as an organ of the Organization, and composed of judges representing the main legal systems of the world.

46. Mr. KEITA (Mali) said that a favourite maxim of the late lamented Paul Reuter had been: "The law is made to ensure the peace and progress of States in order and justice". From that point of view, the establishment of the international criminal court giving judgement on the basis of a code of crimes against the peace and security of mankind would be a salutary initiative, since it would fill a gap in the international legal order. The Code and the court would foster the development of law and the improved functioning of the judicial system, placing international society to an even greater extent under the rule of law.

47. Referring more specifically to the provision on international terrorism (article 16 of the draft articles provisionally adopted so far by the International Law Commission, para. 158), he would be in favour of supplementing the definition given in the draft articles by adding the direct or indirect effects of an act of terrorism on the security of mankind, irrespective of whether the perpetrator was an individual or a State and of whether there was any intellectual, physical or other form of complicity. "Aggression" (article 12), "threat of aggression" (article 13) and "intervention" (article 14) were considered crimes against peace, but situations arising after the commission of the act of aggression must also be punishable, since they were illicit. In the cases of State terrorism directed against another State or another people, ensuing situations took the form of massacres and occupation, annexation and succession of States. Each of those three successive but closely-linked phases - threat of aggression, aggression and effect of aggression - should therefore be condemned as crimes against the peace and security of mankind, all three being illicit acts to be included in the draft.

48. There was, however, another aspect of the threat to or a breach of peace which raised difficulties. That was the deliberate refusal by some States to respect and implement the binding decisions of the Security Council when they were aimed at putting an end to an act of aggression and to its illicit consequences. Should that henceforth be regarded as a crime against peace?

49. Turning to draft article 18, entitled "Recruitment, use, financing and training of mercenaries", he pointed out that a mercenary was an outlaw motivated by his ideology or desire for gain, if not both. Mercenarism was indeed a crime against peace that warranted inclusion in the Code. His delegation therefore agreed with that draft article, which tied in with General Assembly resolution 44/34. With regard to draft article X, concerning illicit traffic in narcotic drugs, his delegation considered that such traffic definitely came into the category of crimes against mankind.

50. With regard to the possible establishment of an international criminal jurisdiction to judge crimes against the peace and security of mankind, his delegation was of the view that the proposed court should have exclusive jurisdiction over the crimes against peace defined in the Code, and concurrent jurisdiction over crimes against the security of mankind, to be defined in the same Code.

(Mr. Keita, Mali)

51. However, the draft concerning the "breach of a treaty designed to ensure international peace and security" was not advisable. The provision would be virtually inapplicable in view of the countless exceptions that would have to be allowed for, which would limit its scope. There were already many other relevant texts in treaty law and concerning the responsibility of States. Jurists might well be reminded of the wise Latin maxim: "Too many laws are harmful".

The meeting rose at 4.25 p.m.